SR 7423

Supreme Court, U.S.
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No. 88-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

COMPAÑIA DE DESARROLLO COOPERATIVO,
Petitioner,

v.

U.S.I. PROPERTIES, CORP.
M.D. CONSTRUCTION, INC.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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February 27, 1989

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QUESTIONS PRESENTED

Whether the jurisdictional integrity of the Federal Courts is violated and realignment of parties is required when two parties sign an agreement in which they resolve all their differences; agree a third party is responsible in the sole issue to be litigated in Federal Court; agree to align themselves as plaintiff and defendant even though they have no controversy between them; and proceed to file a complaint in which they so align themselves and fail to inform the Court of those agreements.

PARTIES TO THE PROCEEDING BELOW

USI Properties Corp. was the plaintiff before the District Court and the plaintiff-appellee before the Court of Appeals for the First Circuit. MD Construction, Co. Inc., respondent herein was a codefendant before the District Court and a defendant-appellee before the Court of Appeals for the First Circuit. Both respondents are the parties in interest to the relief afforded below. Compañía de Desarrollo Cooperativo, petitioner herein, was a codefendant before the District Court for the District of Puerto Rico and defendant-appellant before the Court of Appeals for the First Circuit.

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PETITION FOR WRIT OF CERTIORARI

The petitioner Compañía de Desarrollo Cooperativo (hereinafter C.D.C.), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for First Circuit entered on October 25, 1988.

OPINION BELOW

The opinion of the Court of Appeals is reported as *U.S.I. Properties Corp., v. M.D. Const. Co., Inc.*, 860 F.2d 1 (1st Cir. 1988) and appears as Appendix I hereto. The opinion of the District Court is not reported and appears as Appendix III.

JURISDICTION

The jurisdiction of the Federal Courts was based on diversity of citizenship. The judgment of the Court of Appeals for the First Circuit was entered on October 26, 1988. A timely petition for rehearing and a suggestion for rehearing en banc was denied through order entered on November 30, 1988. This Court jurisdiction is invoked under 28 USC §1254(1).

STATEMENT OF THE CASE

USI Properties, Corp., (hereinafter "USI"), a corporation incorporated in Delaware, duly registered and authorized to do business in Puerto Rico, was created in 1976 for the specific purpose of liquidating excess real estate held by its parent company, USI Industries. April Industries, Inc., (hereinafter "April"), is a Delaware corporation engaged in the business of real estate development in Puerto Rico. It has several subsidiaries, among them MD Construction Co., Inc.

(hereinafter "MD"). MD is a corporation incorporated and doing business in Puerto Rico, a wholly owned subsidiary of April, and is engaged in the construction business. Compañía de Desarrollo Cooperativo (hereinafter "CDC"), is a public corporation and instrumentality of the Commonwealth of Puerto Rico engaged in the development of the cooperative movement in Puerto Rico.

In 1977, USI was looking for alternatives to liquidate its real estate properties in Puerto Rico. April and USI agreed that a 3,000 units housing project for low income families was to be developed in phases in a farm land in Humacao, Puerto Rico. The project was to be known as "Ciudad Cristiana." Around the middle of 1978, April invited CDC to participate in the development of the project and to enter into a number of agreements with USI, April, MD, the Puerto Rico Government Development Bank and the Royal Bank of Canada. On October 17, 1978, USI, April, MD, the Royal Bank of Canada, the Government Development Bank and CDC entered into a series of agreements.

According to the agreements, USI would provide the land, MD/April would develop the project and sell the houses to CDC who, in turn, would sell the houses to individual persons. The number of houses MD/April would sell to CDC each year would be equal to the permanent mortgage financing to be provided by the Farmer's Home Administration, which was 200 per year. The interim financing for the project would be provided by the Royal Bank of Canada in the form of a revolving line of credit provided to CDC. The construction of the houses proceeded until 1982 when a controversy arose between CDC and MD over 53

housing units which MD turned over to CDC and CDC refused to accept. On October 14, 1983, CDC filed a complaint against MD for breach of contract and collection of note and damages, in the Superior Court of Puerto Rico, San Juan Section.

On October 26, 1983, one day before the filing of the action in the present case, USI, April and MD executed a private agreement in which they agreed that April and MD owed $1,585,000 to USI and were therefore liable to USI for said sum; that USI would *only* sue MD and CDC in federal court (USI agreed not to sue April in federal court); that USI would hold in abeyance any judgment against MD until the conclusion of the litigation in federal court; that USI would sue April in the Superior Court of Puerto Rico only after 90 days from the date of the agreement; that MD and April would raise no defense against USI, nor assert any claim whatsoever against USI, *that the only party responsible for the failure of the Ciudad Cristiana project was CDC*; and that April and MD's indebtedness to USI would include up to $60,000 in expenses and legal costs in connection with the case to be filed by USI against MD and CDC in the federal court. See Appendix III. Finally, April and MD agreed to assign to USI any judgment or settlement they may obtain from CDC in an amount sufficient to cover their indebtedness to USI. This agreement was never disclosed voluntarily to the district court.

The next day, on October 27, 1983 the complaint was filed in the instant case naming MD and CDC as codefendants. Appendix IV. The complaint basically alleged as a first cause of action against MD, that MD owed USI the sum of $1,201,600.00 plus

interests, in addition to $60,080.00 as liquidated damages to cover costs and expenses i.e., the "claim" that had been settled the day before. As a second cause of action, the complaint alleged that CDC had breached its obligations arising out of the October 17, 1978 agreements, thus causing the debt of MD to plaintiff to remain unpaid and that therefore, such breaches caused CDC to become liable to USI for the full amount of its credit as stated in the first cause of action. Immediately on October 31, 1983 thereafter MD filed a cross-claim against CDC. On March 5, 1984, MD filed an answer admitting to the complaint all of the allegations of USI's complaint and requested that any judgment entered against it be attributed to the breach of the agreement by CDC and that partial judgment in the same amount be entered against CDC as part of the cross claim of MD against CDC. Later, USI asked the Court to issue a partial judgment on the pleadings in relation to USI's claim against MD and the request was granted without MD's opposition.

In 1987 CDC discovered the existence of the agreement of October 26, 1983 between USI, April and MD which had never been disclosed by said parties. CDC asked for dismissal, by way of a Motion for Realignment of Parties. The court heard argument on this motion and denied it after trial was concluded, in its Opinion and Order of June 29, 1987. Appendix III. After conclusion of trial the jury awarded damages of $12,000,000.00 to USI and MD and against CDC. The judgment was appealed to the United States Court of Appeals for the First Circuit. The Court of Appeals affirmed the District Court judgment on October 25, 1988. In its opinion the Court of Appeals held that the facts of this case did not require a realignment of the parties which would defeat federal jurisdiction.

REASONS FOR GRANTING THE WRIT

The Court of Appeals decision raises important issues concerning the jurisdictional integrity of the federal courts in diversity of citizenship cases. USI, the plaintiff, and MD, a defendant, signed a written agreement, the day before the complaint was filed, in which they resolved all their differences. MD accepted liability of a debt to USI; agreed not to raise any claim or defenses against USI and both agreed that CDC, the other defendant, was responsible for the failure of the construction project called Ciudad Cristina and therefore liable to both of them. Even though they had no actual, substantial controversy between them, they agreed to align themselves on opposite sides as plaintiff and defendant in the suit to be filed in Federal Court. The Court of Appeals, and the District Court below refused to realign MD as a plaintiff; realignment which would have defeated diversity since both CDC and MD are citizens of the Commonwealth of Puerto Rico. Thus, the opinion of the Court of Appeals permits two parties to settle all their differences, to agree to "join forces" against a third party; then to file a complaint in which they align themselves on opposite sides, as plaintiff and defendant, even when no controversy exists between them, thereby artificially creating "complete" diversity of citizenship. This is precisely the type of "illusive artifices" which were rejected by this Court in *City of Indianapolis v. Chase Manhattan National Bank*, 314 U.S. 63, 76 (1941). Indeed, it is petitioners contention that if realignment of the parties is not required in these circumstances, the First Circuit has effectively eradicated the realignment doctrine contrary to Supreme Court precedent, and in conflict

with *every* Circuit Court of Appeals that has considered the subject. The dangerous consequences to the jurisdictional integrity of the Federal Courts and the conflict between the First and the rest of the Circuits justifies the issuance of a writ of certiorari.

I. The decision of the Court of Appeals for the First Circuit is in conflict with the realignment doctrine established by this Court.

It is settled law that "diversity jurisdiction can not be conferred upon the Federal Courts by the parties own determination of who are plaintiffs and who defendants". *City of Indianapolis v. Chase National Bank*, 314 U.S. 63, 69 (1941). It is the duty of the federal courts to "look beyond the pleadings and arrange the parties according to their sides in the dispute". *Dawson v. Columbia Ave. S.F.S.D.T. & T. Co.*, 197 U.S. 178, 180 (1905). "Realignment is proper where there is no actual, substantial conflict between the parties that would justify placing them on opposite sides of the lawsuit". *American Motorist Insurance v. Trane Co.*, 657 F.2d 146 (7th Cir. 1981). In *City of Indianapolis*, this Court held that the decisive factor in realignment was the *position* of the parties with respect to the "primary or controlling controversy" in the case. Thus, even if there exists a real conflict between the parties, their positions on the controlling or primary dispute is the same, if they should be aligned on the same side. *See* 13B Wright, Miller & Cooper, *supra*, § 3607, at 639, 641; *Lowe v. Ingalls*, 723 F.2d 1173 (5th Cir. 1984). The Seventh Circuit, however, has refused to so interpret *City of Indianapolis* and has required, for the court not to engage in realignment, only the existence of an actual substantial conflict between the parties, but not that

it be over the primary issue in litigation.[1] *Fidelity & Deposit Co. v. Sheboygan Falls*, 713 F.2d 1261, 1267 (7th Cir. 1983).

In the case at bar, it is clear that the dominating controversy was: Who was responsible for the failure of the Ciudad Cristiana project, M.D. or C.D.C.? i.e., Who was liable for breach of contract with regard to the Ciudad Cristiana agreements? This is the "primary and controlling matter in dispute", and on this issue, USI and MD have always been united: both have always contended that CDC was responsible for breach of contract respecting the Ciudad Cristiana agreements and was, therefore, liable to both of them. In fact, pursuant to the October 26, 1983 agreement, both of them agreed to assume that position in this litigation, before the complaint was filed. *See* Appendix III. Thus the "ultimate interests" of USI and MD in the outcome of this litigation have always been, therefore, on the same side.

Indeed, this case is way beyond the *City of Indianapolis* case for not only have USI and MD been united on the primary and controlling issue in this case, but they have been totally united; there is a

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[1] 13B Wright, Miller & Cooper, *Federal Practice and Procedure*, § 3607, at 433-34 says:

> The generally accepted test of proper alignment is whether the parties with the same 'ultimate interests' in the outcome of the action are on the same side. This test is meant to insure that there is an 'actual', 'substantial', controversy between citizens of different states, all of whom on one side of the controversy are citizens of different states from all parties on the other side.

complete absence of any controversy between them.[2] They are, in effect, "partners in litigation". 314 U.S. at 74. Their partnership permeated every aspect of these proceedings. Not only did USI and MD resolved all their differences before the complaint was filed, and agreed on every substantive issue during the litigation, but they made a practice of filing joint motions and oppositions. Counsel for both parties, plaintiff and "defendant", sat together at trial, consulted with each other constantly and supported each other's objections and arguments. To paraphrase this Court in *City of Indianapolis*, 314 U.S. at 74, what USI wants MD wants and CDC does not want.

The Court of Appeals refused to realign the parties on the grounds that "one key issue remained in controversy namely who would pay for the breach" and because MD's concession of its debt to USI "did not equate to payment". 860 F.2d at 4. The fact that one key issue remained in controversy is irrelevant. The important point is what is the *position* of the parties with regard to that "one key issue. . . in controversy". Since the Court of Appeals concluded that both USI and MD "alleged that CDC was the party ultimately responsible for the breach", 860 F.2d at 4, the only possible conclusion is that both USI and MD are in agreement that CDC "would pay for the breach". Thus, the position of USI and MD is exactly the same with regard to that issue. The relevance of the fact that MD's concession of debt to USI "did not equate to payment. . . since MD consistently has held that CDC is the party responsible for the failure

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[2] Thus, it is immaterial how *City of Indianapolis* is interpreted for under any interpretation realignment is required in this case.

of the whole project," is difficult to understand, because as the Court of Appeals itself acknowledged, *USI* also alleged that CDC was the party responsible for the failure of the whole project. So, from this analysis it is impossible to say that there is a *controversy* between USI and MD.

The Court of Appeals further expounded that "MD's concession of liability meant the unavoidable realization that it would pay—yet to be determined, however, was the most crucial detail of whether payment would be out of its own funds or out of monies recovered from CDC. There remained a real conflict of interest between the parties." 860 F.2d at 5.[3] The fact that the "detail of whether payment would be out of [MD's] own funds or out of money recovered from CDC" had yet to be determined does not mean that USI and MD had a controversy over that "de-

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[3] The Court of Appeals also cited approvingly from the District Courts Opinion and Order, the following words:

> The plaintiff and MD, although having common strategies against CDC, indeed had different interests, USI's interest is to, in its day, execute against MD and eventually, annul CDC's first-ranking mortgage or to recover directly from [MD]. MD's interest is to recover its own damages and to pay USI. Realignment is not called for under these circumstances.

To prevent realignment, the law does not require that USI and MD have "different interest", but the existence of an "actual, substantial controversy" between them. The district court's explanation of USI's and MD's "different interests", however, betrays the total absence of any controversy between them. According to the district court, both USI and MD want to collect from CDC, USI wants to "execute against MD" and MD wants to pay. It is difficult to see what is the controversy between a party who wants to "execute" and a party who wants to "pay".

tail". As a matter of fact they both were in agreement that payment should come out of "money recovered from CDC" 860 F.2d at 5. In these circumstances the "real conflict of interests" between USI and MD, to which the Court of Appeals refers, is difficult to see.

Finally, the Court of Appeals discusses the scenario of a suit by USI against CDC alone whether MD is an indispensable party and how it would be aligned, as a plaintiff or as a defendant? At 860 F.2d 5, n.1 of the Opinion the Court of Appeal states:

> If the lawsuit had commenced with USI as plaintiff and CDC as the sole defendant, MD would undisputably have been found to be an indispensable party under both R.19(a)(1) and (a)(2). . . More difficult would be to place MD as plaintiff or defendant, since the 1983 agreement would seem to make MD a plaintiff as to CDC, whereas the debt on the note would certainly make it a defendant as to USI. However, in our exercise of "if history", MD would still be a defendant, since CDC would have had to bring MD into the lawsuit in the posture of a third party defendant, brought in as the party ultimately liable for USI's claim against CDC.
>
> As to USI, MD remained a defendant even after the 1983 agreement, since MD still owed USI the debt the note certified. A judgment on this debt would be facilitated, no precluded, by MD's concession of its debt. Therefore, even under this approach MD would still be a defendant, and the federal

court would still have subject matter jurisdiction.

It is not correct that CDC "would have had to bring MD into the lawsuit in the posture of a third party defendant". If as the Court of Appeals says "MD would undisputably have been found to be an indispensable party" MD would have been joined and the court would have had to align MD according to its real interest in the litigation. See *Dolch v. United California Bank*, 792 F.2d 178, 181 ("While Fed. R. Civ. P. 19 can require that indispensable parties be joined it does not dictate alignment"). Since MD had acknowledged its debt to USI its real interest would have been not to oppose USI but to support USI's claim against CDC. In the scenario considered by the court the debt owed by MD to USI would have been even more irrelevant than in this case, since USI would not have filed a complaint against MD. To say, therefore, that in such a situation MD would have been a defendant is to yield to the "illusive artifices" which have prevailed in this case up to this moment.

The doctrine of realignment, does not focus on the existence of a "controversy" between the parties arbitrarily. There are important and powerful reasons of policy why this is so. Realignment doctrine is designed to insure that there is an "actual substantial controversy between citizens of different states, all of whom on one side of the controversy are citizens of different states from all parties on the other side". 13R Wright & Miller & Cooper, at §3607, p. 433-34. Therefore, the doctrine does not focus on "payments", "risks", "debts still owed', or other irrelevant considerations, but instead emphasizes the

existence of a real, substantial and actual controversy between the parties.

The opinion of the Court of Appeals legitimizes the following scenario: one day prior to the filing of the complaint two parties sign an agreement in which they resolve all their differences; agree a third party is responsible in the sole issue to be litigated in federal court; agree to align themselves as plaintiff and defendant; proceed to do so, and fail to inform the court of these agreements. Surely this is not the type of practice that this Court wants to encourage in the Federal Courts.

Finally, if in these circumstances realignment is not required it is very difficult to imagine that it would ever be required. By definition, a "key issue in controversy" will always exist in a lawsuit. If realignment is precluded by the existence of a "key issue" it will never be required. If, however, the *position* of the parties is the decisive factor, the courts will engage in realignment depending on whether the parties are on the same side of the "issue". By the same token "details" not resolved will always be present in a lawsuit; but whether a controversy exists over that "detail" is another matter. The Court of Appeals opinion is totally incompatible with this courts precedents and therefore a writ of certiorari should be issued.

II. The Court of Appeals Opinion is in conflict with recent decissions of the Ninth, Eleventh, Fifth and Seventh Circuits.

The Circuit Court of Appeals which have considered the issue of realignment have realigned the parties in accordance with their real interest in the litigation.

See *Dolch v. United California Bank*, 702 F.2d 178 (9th Cir. 1983) ("if the interest of a party named as a defendant coincide with those of the plaintiff in relation to the purpose of the lawsuit, the named defendant must be realigned as a plaintiff for jurisdictional purposes".) *Weller v. Navigator Marine, Inc.*, 737 F.2d 1547, 1548 (11th Cir. 1984), ("we must 'determine whether there is an actual or substantial controversy between citizens of different states'" and "we look to the true interest of the parties and the position asserted by them before the district court in making this determination"); *Lowe v. Ingalls Ship Building*, 723 F.2d 1173 (5st Cir. 1984) ("the parties had "*essentially* resolved their differences prior to the commencement of this action" and therefore a defendant should be realigned as a plaintiff.); *Fidelity Deposit Co. of MD v. Sheybogan Falls*, 713 F.2d 361, 1266-67, (7th Cir. 1983) (if it were certain that the plaintiff *knew* when he filed his complaint that one of the defendants would "in effect confess liability" that defendant should be realigned as a plaintiff.); *American Motorist Insurance Company v. Train*, 657 F.2d 146 (7th Cir. 1981).

The doctrine of realignment of parties is closely tied to the scope of the federal judiciary's exercise of limited jurisdiction in cases of diversity of citizenship. By requiring an actual, substantial controversy between the parties, the doctrine seeks to preserve the jurisdictional integrity of federal courts in cases arising pursuant to 28 U.S.C. §1332. By misfocusing on irrelevant considerations, the First Circuit has virtually eradicated the doctrine from that Circuit signalling the reign of illusion and artifice in diversity jurisdiction cases in federal courts. This jurisdictional

dilution is antithetical to this Court's *City of Indianapolis* decision and in conflict with the decisions of other Court of Appeals.

CONCLUSION

For the foregoing reasons, it is respectfully requested from this Honorable Supreme Court that it grant this Petition for Writ of Certiorari to the Court of Appeals for the First Circuit.

In San Juan, Puerto Rico, this February 27, 1989.

RESPECTFULLY SUBMITTED.

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APPENDIX I

Opinion of October 25, 1988 of the First Circuit Court of Appeals reported at 860 F.2d 1, (1st. Cir. 1988)

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 87-1721

U.S.I. PROPERTIES CORP.,
Plaintiff, Appellee,

v.

M.D. CONSTRUCTION COMPANY, INC., ET AL.,
Defendants, Appellees,

COMPANIA DE DESARROLLO COOPERATIVO,
Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO
[Hon. Jose Antonio Fuste, *U.S. District Judge*]

Before

Campbell, *Chief Judge,*
Torruella and Selya, *Circuit Judges.*

Marcos Ramirez Lavandero with whom *Dennis Simonpietri Monefeldt, Salvador Tio, Gretchen Coll Marti* and *Ramirez & Ramirez* were on brief for appellant.

Ruben T. Nigaglioni with whom *Maria Soledad Pineiro* and *Ledesma, Palou & Miranda* were on brief for appellee U.S.I. Properties Corp.

Harry E. Woods with whom *Geoffrey M. Woods*, *Gerardo Mariani* and *Woods & Woods* were on brief for appellee M.D. Construction Company, Inc.

OCTOBER 25, 1988

TORRUELLA, *Circuit Judge*. This appeal follows a five and a half week jury trial that resulted in a $12.5 million verdict for plaintiff USI Properties Corp. and for codefendant MD Construction Inc. Appellant, defendant Compañía de Desarrollo Cooperativo, raises a number of issues of very diverse nature and complexity. Having reviewed carefully the unnecessarily ponderous briefs and record, we affirm.

Background

The basic event underlying this complex case is the signing of multiparty agreements on October 17, 1978 ("1978 agreements"). The parties were USI Properties Corp. ("USI"), a Delaware corporation, Compañía de Desarrollo Cooperativo ("CDC") a public corporation of the Commonwealth of Puerto Rico, MD Construction, Inc. ("MD"), which is incorporated under the laws of Puerto Rico, April Industries Inc. ("April"), Government Development Bank for Puerto Rico, and the Royal Bank of Canada. April, a Delaware publicly owned corporation, is the sole owner of Futura Development Co. of Puerto Rico, itself the sole owner of MD.

The terms of the agreement were as follows: USI sold a parcel of land to MD where MD would construct a housing project called Ciudad Cristiana. The purchase price was $1,224, 230, with a downpayment of $5,000. USI retained a mortgage on the land payable at the completion of the project, which, with interest, was worth approximately $1.6

million. April entered into the agreement as guarantor of MD.

A second agreement on the same date bound MD and CDC as follows: MD would build 700 housing units on the land purchased from USI and CDC would sell the houses to individual buyers. The Royal Bank of Canada provided CDC a revolving line of credit of $4.5 million to provide the interim financing for the project. The Bank commitment was secured by a $5 million note from MD, and by a first mortgage on the land sold by USI. In order for the Bank to obtain a first mortgage on the land, USI agreed to subordinate its lien to the Bank's lien.

CDC agreed to notify USI of any breach committed by MD or any variations in performance by CDC. In early 1982, however, after completion and delivery of 480 units, CDC stopped financing the project, for reasons the parties still dispute. Once the flow of funds from CDC stopped, MD could not proceed with the project, and thus defaulted in its payment obligations to USI.

CDC sued MD in the Puerto Rico superior court in October 1983. Also in October, USI sued MD and CDC in federal court.

On October 26, 1983, one day before USI filed its complaint, USI, MD and April entered into an agreement ("1983 agreement") which included the following items:

1. MD conceded owing USI $1,585,000;
2. USI would sue MD and CDC in federal court;
3. USI would not execute against MD on the note or on any judgment until 30 months after the agreement;
4. MD and April assigned to USI any judgment or settlement resulting from federal or state actions or from any out of court settlement resulting from actions by or against CDC;

5. USI would sue April in the Superior Court of Puerto Rico only after 90 days from the date of the agreement;

6. MD and April would not raise defenses against USI nor assert any claim whatsoever against USI other than that the only party responsible for the failure of the project was CDC.

USI sued MD and CDC in federal court in October 1983. MD filed a crossclaim against CDC, which in turn filed a crossclaim against MD and a counterclaim against USI. Trial commenced on May 15, 1987 and lasted over five weeks. The jury returned a verdict in favor of USI, against CDC, for $1.2 million, and for MD on its crossclaim against CDC for $11.4 million.

One of CDC's main defenses was that the land used to develop the Ciudad Cristiana project was contaminated with mercury. Both the Secretary of the Department of Health and the head of the Environmental Quality Board testified about the reasons for their determination that the area had to be evacuated. Following this determination, the government had evacuated the area in 1985. The Ciudad Cristiana "scandal" resulted in extensive hearings in the Puerto Rico legislature.

The remaining facts will be provided as they become relevant to the issues on appeal.

Discussion

Appellant CDC raises a veritable barrage of issues. Given their diverse nature and complexity, we will discuss them sequentially as presented by CDC.

1. Jurisdiction: Realignment of Parties

CDC argues that USI and MD should be realigned as parties, based on the 1983 agreements, and relying on *Indianapolis* v. *Chase National Bank*, 314 U.S. 63 (1941). Such a finding would divest the federal courts of diversity

jurisdiction. The issue boils down to the import of the 1983 agreements on the controversy at hand. CDC argues that the dominating controversy in this case is who is liable for breach of contract with regard to the Ciudad Cristiana agreements. Therefore, since both USI and MD agree that CDC should be liable, USI and MD are on the same side of the controversy and should be realigned as plaintiffs. If USI and MD were both plaintiffs, then there would be Puerto Rico corporations on both sides of the case—MD as a plaintiff and CDC as defendant—thus defeating diversity jurisdiction.

Our task is to determine "the primary and controlling matter in dispute," *Indianapolis*, 314 U.S. at 72, and then determine whether any actual collision in interests remains. In other words, are USI and MD "partners in litigation"? *Id.* at 74. The reasons for such an argument are worthy. The 1983 agreement made USI and MD partners in litigation insofar they both alleged that CDC was the party ultimately responsible for the breach. Furthermore, MD agreed not to raise any defenses against USI.

Unfortunately for CDC, one key issue remained in controversy, namely, who would pay for the breach. Indeed, MD conceded its debt to USI, but that did not equate to payment at that time, since MD consistently has held that CDC is the party responsible for the failure of the whole project. MD assigned to USI all amounts to be recovered in the action against CDC, but even assignment of amounts recoverable did not abate MD's risk.

The district court found there was a genuine conflict between the parties at the time USI filed its complaint. The court found that the 1983 agreements "all boil down to the fact that MD would eventually transfer or assign to USI litigation proceeds in the amount of its debt from any judgment awarded MD against CDC." Opinion and Order, No. 83-2647, slip op. at 11 (D.P.R. June 29, 1987). The court further stated:

> The plaintiff and MD, although having common strategies against CDC, indeed had different interests. USI's interest is to, in its day, execute against MD and, eventually, annul CDC's first-ranking mortgage or to recover directly from [MD]. MD's interest is to recover its own damages and to pay USI. Realignment is not called for under these circumstances. *City of Dawson* v. *Columbia Ave. Saving Fund*, 197 U.S. 178 (1905); *Dolch* v. *United California Bank*, 702 F.2d 178 (9th Cir. 1983) (in an estate's context); *Hopkins Erecting Co.* v. *Brianwood Apartments*, 517 F. Supp. 243 (E.D. Ky. 1981) (in a removal context). Accordingly, we find that jurisdiction under 28 U.S.C. § 1332 lies.

Id. at 14.

We agree. Looking at the pleadings, and at the background of this action, we find that the court below correctly found diversity jurisdiction. This is a close case in an area where the applicable law is not especially enlightening. However, the court's findings are clearly supported by the record and reflect appropriate application of *Indianapolis* and progeny. MD's concession of liability meant the unavoidable realization that it would pay—yet to be determined, however, was the most crucial detail of whether payment would be out of its own funds or out of monies recovered from CDC. There remained a real conflict of interests between the parties.[1] *See* 3A J. Moore,

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[1] Another perhaps useful approach to this difficult problem, exemplified in *Fidelity & Deposit Co. of Maryland* v. *Sheboygan Falls*, 713 F.2d 1261, 1268 (7th Cir. 1983), is to speculate on a different scenario: if the party to be realigned had been left out of the lawsuit, would that party be indispensable under Fed. R. Civ. P. 19? And if so, on what side of the lawsuit? If the lawsuit had commenced with USI as plaintiff and CDC as the sole defendant, MD would undisputably have been found to be an indispensable party under both R. 19(a)(1) and

J. Lucas, G. Grotheer, *Moore's Federal Practice* ¶ 19.03, 19-52 (2d ed. 1987).

2. Jurisdiction: Collusion

CDC's next line of attack, again pegged to the 1983 agreements, is based on 28 U.S.C. § 1359, which states that "[a] district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court." Under this statute, courts must determine whether any party has been artificially brought into or left out of an action in order to invoke the jurisdiction of the federal court.

The district court, relying on *Kramer* v. *Caribbean Mills*, 394 U.S. 823 (1969), found that arguing collusion did not assist CDC much because it is not on account of the 1983 agreement that USI is a plaintiff in this case. This case stems from the multilateral agreements that would have led to the construction of the Ciudad Cristiana project. USI is not a party brought in only to manufacture diversity jurisdiction. Neither is MD placed as a defendant due to some contrivance. MD was liable to USI under a promissory note, and had a colorable (indeed, ultimately successful) claim against CDC.

(a)(2). *See Acton Co., Inc. of Massachusetts* v. *Bachman Foods, Inc.*, 668 F.2d 76, 78-79 (1st Cir. 1982). More difficult would be to place MD as plaintiff or defendant, since the 1983 agreement would seem to make MD a plaintiff as to CDC, whereas the debt on the note would certainly make it a defendant as to USI. However, in our exercise of "if history," MD would still be a defendant, since CDC would have had to bring MD into the lawsuit in the posture of a third party defendant, brought in as the party ultimately liable for USI's claim against CDC.

As to USI, MD remained a defendant even after the 1983 agreement, since MD still owed USI the debt the note certified. A judgment on this debt would be facilitated, not precluded, by MD's concession of its debt. Therefore, even under this approach MD would still be a defendant, and the federal court would still have subject matter jurisdiction.

CDC raises two more arguments sounding in collusion. April was not sued, even though it was a party to the 1978 agreements and even though it ultimately could face liability as a guarantor for MD. Indeed, April was a party to the 1983 agreement, and there was some evidence that obtaining federal jurisdiction was a consideration in leaving April out of the complaint. However, given April's role as guarantor to MD's note to USI, USI could choose to sue the note issuer, the guarantor, or both. Without any artificial shifting of roles, USI could sue only MD and CDC.

The remaining issue is the allegedly stealthy way in which the agreements were entered into and later "hidden" from CDC and the court. It is unclear how appellants learned of the 1983 agreements. According to appellants, they had to conduct some imaginative sleuthing to find the agreements. According to appellees, it was there for the asking, and were in fact provided upon request. Any delay was the result of the fact that the assignment agreements bore no relevance to the breach that caused the lawsuit.[2]

The court below correctly found that "the MD-USI assignment does not bestow on USI the rights under which it sits as plaintiff. With or without assignment, diversity jurisdiction among the parties exists." Opinion & Order No. 83-2647, slip op. at 9 (D.P.R. June 29, 1987). We note, furthermore, that parties may legitimately try to obtain the jurisdiction of federal courts, as long as they lawfully qualify under some of the grounds that allow access to

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[2] CDC proceeds to accuse opposing counsel of fraud upon the court, which counsel for USI and MD vehemently deny. It is not the role of this court to determine the veracity of statements by officers of the court, as all lawyers are. As far as we can tell, however, these allegations are without justification. It is, furthermore, highly unbecoming to allow allegations of fraud upon the court to appear as part of the substantive argumentation. Careful research and cogent reasoning, not aspersions, are the proper tools of our trade.

this forum of limited jurisdiction. On the other hand, using a strawman, or sham transactions, solely for the creation of otherwise unobtainable jurisdiction, is clearly forbidden both by statute and by the policies that underlie diversity jurisdiction.

3. Jurisdiction: USI's Principal Place of Business

CDC's next line of attack is to argue that diversity jurisdiction does not lie because USI's principal place of business is Puerto Rico. CDC does not challenge the court's application of the "principal place of business test." *See Topp* v. *Compair Inc.*, 814 F.2d 830, 834 (1st Cir. 1987). Instead, CDC focuses on the factual basis for the court's determination, namely, that the evidence produced by both parties supported the finding that Puerto Rico was USI's principal place of business. The court's determination that New York is USI's principal place of business is to be affirmed unless found to be clearly erroneous. *See Valedon Martinez* v. *Hospital Presbiteriano*, 806 F.2d 1128 (1st Cir. 1986).

The court reviewed evidence offered by CDC and concluded that policy decisions were made in New York, where the administrative offices were located, and that the last tax returns had been filed in New York. The record supports these findings, and thus we cannot find that the court's determination was clearly erroneous.

4. Jurisdiction: April as an Indispensable Party

The next arrow in CDC's quiver is based on arguing that April is an indispensable party, which would defeat diversity jurisdiction because USI and April are both citizens of Delaware.

April is the "grandparent" of MD; MD is the wholly owned subsidiary of Futura, itself a wholly owned subsidiary of April. April's role in the original agreements is that of a guarantor of the USI note, liable jointly and severally with MD.

This court set out the applicable guidelines for the treatment of indispensable parties in relation to diversity jurisdiction.

> Rule 19 of the Federal Rules of Civil Procedure provides for the joinder to a suit of parties needed for its just adjudication. The rule furthers several related policies, including the public interest in preventing multiple and repetitive litigation, the interest of the present parties in obtaining complete and effective relief in a single action, and the interest of absentees in avoiding the possible prejudicial effect of deciding the case without them. Rule 19(a) sets forth three types of parties to be joined if feasible; but if joinder will divest the court of subject matter jurisdiction, Rule 19(b) directs the court to "determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed."

Acton Co., Inc. of Mass. v. *Bachman Foods, Inc.*, 668 F.2d 76, 78 (1st Cir. 1982).

Without articulating any reasons for this finding, the district court concluded that April was not an indispensable party. Providing a bit more reasoning, we agree.

Under Puerto Rico law, when a guarantor is solidarily bound with a debtor, namely, jointly and severally liable, a plaintiff claiming on the debt can sue one, the other, or both. 31 P.R. Laws Ann. § 4871, *et seq.* (1968), *Colon* v. *P.R. & Am. Insurance Co.*, 63 P.R.R. 332, 340-41 (1944). By law, therefore, a guarantor is not an indispensable party under Puerto Rico law for purposes of Rule 19 because, as to these parties, complete relief was available without the need to bring in April. There is no danger of repetitive proceedings because if April's rights ever came into play they would only affect its relationship with MD,

the principal debtor, not affecting the merits of the USI-MD-CDC lawsuit.

We note that CDC's allegations ring hollow in light of the fact that in a parallel action in Puerto Rico courts, it chose to sue MD, without including the now allegedly indispensable party.

5. Jurisdiction: MD as an Alter Ego of April

In yet another attempt at challenging federal jurisdiction, CDC next raises the issue of MD's existence as a separate corporate entity. CDC would have us find that MD's citizenship is that of its grandparent corporation, Delaware, which would defeat diversity with USI. CDC correctly points out the legal standard: subsidiary and parent corporations are generally considered to be separate entities for diversity jurisdiction purposes. *Topp* v. *Compair, Inc.*, 814 F.2d 830, 835 (1st Cir. 1987). The court there also stated that even if the parent corporation exerts a high degree of control through ownership or otherwise, and even if the separateness is perhaps only formal, the subsidiary's place of business is controlling for diversity purposes if the corporate separation is real and carefully maintained. *Id.* at 836. This is a factual determination, which we can overturn only if we find it to be clearly erroneous.

CDC argues that MD is not only a wholly owned subsidiary of April, but also shares all officers and directors with its grandparent corporation. MD does not contest this proposition. CDC further argues that MD does not prepare its own budget, construction requirements, or policies and procedures and that it is grossly undercapitalized. MD asserts it existed as a separate entity for seventeen years, and had surpluses ranging from $600,000 to $1,000,000. MD further states that it has always kept separate records, books, and minute books. The reason we go through this ping-pong exercise is to gauge the district court's basis for its finding that the alter ego doctrine did not make

April the real party in this litigation. Clearly, the court had sufficient evidence for its conclusion.

6. Ultra Vires

Paradoxically, CDC argues that its signing the 1978 agreements was forbidden by Puerto Rico law. CDC is a public corporation created for the purpose of furthering "the swiftest expansion of the Puerto Rican cooperative movement." P.R. Laws Ann. tit. 5, § 981b (1982). On its face, the statute makes no statement as to the reach of CDC's legitimate activities. On the contrary, § 981e(a) states that "[t]he Company shall foster, by such means as it may deem most desirable, the development and expansion of cooperative enterprises by helping them promote, initiate, and maintain in operation *all kinds of economic activities*" (emphasis added). Ambiguity enters through another door. The Department of Housing, created by Law 97 of June 10, 1972, P.R. Laws Ann. tit. 3, § 441, *et seq.* (1982), is "responsible for making and executing the public policy on housing and communal development of the Commonwealth of Puerto Rico, and of administering all the governmental programs in this field." *Id.* § 441b. From this language, appellants infer that the Department of Housing has *exclusive* authority for the construction of any kind of housing projects by the Commonwealth government.

Facially, this argument does not carry much weight. Section 441b(e) states, as one of the functions of the Housing Department:

> (e) To develop the construction of housing projects for cooperatives organized by government organizations responsible for this function. It being understood, further, that the Department of Housing shall coordinate and refer to the agencies of the Cooperative Development Administration and the Cooperative Development Company of Puerto Rico the groups interested in the or-

> ganization of housing cooperatives to be guided as to everything related with the organization and operation of this kind of cooperative. Provided, that said agencies shall retain the functions of promotion, development, education, organization and qualification of members of housing cooperatives.

The specific reference to CDC and its possible interplay with the Department of Housing casts appellant's argument in a very dim light. But from this statutory basis, we must go back to the factual history of the case to determine whether the ultra vires argument obtains.

CDC had approval from its own counsel and from its finance committee to enter into the 1978 agreements. The Government Development Bank, fiscal agent for CDC (and for the Commonwealth government in its entirety, *see* P.R. Laws Ann. tit. 7, § 581 (1982)), approved CDC's role in the project. Appellees contend, and CDC does not challenge, that the Department of Housing supervised CDC's participation in this enterprise. Furthermore, the Puerto Rico Housing Bank, a public corporation "attached" to the Department of Housing (*see* P.R. Laws Ann. tit. 3, § 441e (1982)), actively participated in the 1978 agreement in the role of guarantor to the mortgages for the project.

From this perspective, it may seem amazing that an ultra vires argument should arise at all. However, the Department of Justice issued an opinion early in 1982 to the effect that CDC had no stated or constructive powers to develop cooperative housing projects. *See* 1982 Op. Sec. Jus. No. 8. This position was confirmed by the Comptroller General of Puerto Rico.

We note first that the opinions of the Secretary of Justice of Puerto Rico are not binding upon the courts. *Meléndez Ortiz* v. *Valldejuli*, 87 J.T.S. 112, n.7 (1987). Further, under Puerto Rico law, great deference is due to an agency's construction of its powers pursuant to its

organic act, *Hernández Denton* v. *Quiñones Desdier*, 102 D.P.R. 220 (1974). We find, based on the statutory language and on the housing agencies' reading of the statute (as expressed also by the participation of the Department of Housing and the Housing Bank), that the court did not err in finding that CDC did not act beyond its statutory powers in entering into the 1978 agreements.

7. Improper Statements by MD Counsel

CDC seeks reversal based on several statements made by MD's counsel during closing argument, regarding the veracity of CDC's witnesses. MD counsel used the words "corrupt," "conspirators," "lies," "prevarications" and others to refer to the testimony of CDC's witnesses. CDC did not object at the time.

Our task is to review the court's decision to allow the statements under the "plain error" standard. *Emery-Waterhouse Co.* v. *Rhode Island Hosp. Trust Nat'l Bank*, 757 F.2d 399, 410 (1st Cir. 1985). In the context of civil cases, we have stated that judges have "considerable discretion." *Id.*

We find the language in *Service Auto Supply Co. of P.R.* v. *Harte & Co.*, 533 F.2d 23 (1st Cir. 1976) especially applicable to this case:

> Appellant sees fit to challenge the closing argument of appellee's counsel. It does indeed appear, in cold print, somewhat Gothic and extreme. But there was no call on the court to halt the excess of verbal imagery or invocation to the poets. We cannot fault the court. And perhaps opposing counsel felt that the effort would trip on its own ebullience. This kind of play must normally be left to counsel and the trial court, at least in a civil case.

Id. at 28. While we do not take kindly to statements of counsel's opinions, *see Polansky* v. *CNA Insurance Com-*

pany, No. 87-2086, slip op. at 4 (1st Cir. July 25, 1988), in a civil case and absent timely objection, "we cannot fault the court."

8. Discovery

CDC and MD struggled strenuously to get more time for discovery, which the court steadfastly resisted (although the trial was postponed for 45 days to allow termination of discovery). Now that each party has its lot, CDC finds offense in the court's direction (whereas MD now apparently sees the wisdom of the court's rulings).

The basic allegation is that the district court considered more important the "public interest" of not having a case lie on its docket for a long time, over the actual interests of the litigants. *See Alamance Industries, Inc.* v. *Filene's*, 291 F.2d 142, 147 (1st Cir. 1961).

We have reviewed the voluminous files of this case and find that the district judge grabbed control of a complex and controversial litigation effectively, and stringently, in the face of a deluge of papers. We note that the issues deemed insufficiently addressed—mercury contamination and the arguably political background of the case—were addressed at trial and that the main characters in the decision-making process of all parties were deposed and/or examined and cross-examined at trial. There is no indication of abuse of discretion.

9. Rule 37 motions

Shortly before and even during trial, CDC filed Motions under Fed. R. Civ. P. 37 requesting dismissal of appellees' claims arguing that it was unprepared to go to trial because of failure to disclose on their part. Appellant's argument raises no compelling issues. We have reviewed the record and find no abuse of discretion.

10. Polling the jury

On June 18, 1987, while the trial was in progress, a major newspaper published an article with the headline

"Contractors Exonerated," and a smaller headline read "The Commonwealth Loses the Ciudad Cristiana Case." The court alerted counsel of the article and, after hearing argument, decided not to poll the jury about whether they had seen the headlines or article. The court stated:

> THE COURT: Remember, Mr. Simonpietri [CDC counsel], that none of the issues that are published in the story which relates to the voluntary dismissal of complaints, basically[,] [a]nd the potential economic impact this may have on the Government, as a result of the voluntary dismissal and other expenditures that the newspaper claims have been related to this case, is not going to be before them for decision anyway. That is not part of what they are going to decide. And I don't think I should poll the Jury under those circumstances.
>
> What I will do is, I will instruct them accordingly as I have done in the past in a more expanded fashion, about what is it they can do or cannot do from the standpoint of newspapers. As I said before, we should not presume that Jurors are here violating their duties and their sworn obligations. We should presume that the possibility always exists that they are confronted with the material. But we must presume, that as good citizens, as I am sure they all are, they are going to respect the Court's instructions on that issue.

Throughout the trial, the Court repeatedly instructed the jury to avoid media exposure. The court's balanced approach is both appropriate and desirable in the context of a civil case, considering the possibility of prejudice, the contents of the article, and the costs to litigants and to the courts.

11. New Trial

CDC requests a new trial on three grounds, only two of which deserve discussion.

A. Sufficiency of the Evidence

We have stated repeatedly the standard to overturn a trial court's decision not to grant a new trial: the appellant "must show that the verdict was 'so clearly against the weight of the evidence as to constitute a manifest miscarriage of justice.' " *Jordan* v. *United States Lines, Inc.*, 738 F.2d 48, 49 (1st Cir. 1984) and cases cited therein.

We have reviewed the record, and find that this case is not even a close one. CDC is attempting to convince us of an *interpretation* of documents presented in evidence based on correspondence prior to the 1978 agreements and communications after the agreements, to find that MD had a responsibility to obtain financing for the project. CDC even qualifies its conclusion by stating that "the jury's verdict is clearly unsupported by the evidence, *or at least clearly against the great weight of the evidence.*" We refuse to accept the invitation to engage in fact finding; it is now late to retry the case.

B. Parol evidence

Under Puerto Rico law, if the words of a contract appear contrary to the evident intention of the contracting parties, the acts of the parties, both contemporaneous with and subsequent to the contract, are evidence relevant to the contract's interpretation. P.R. Laws Ann. tit. 31, §§ 3471 and 3472. *See Marina Industrial, Inc.* v. *Brown Boveri Corp.*, 114 D.P.R. 64 (1983) (the strict mandate of § 3471 requires the court to abide by the literal meaning of the terms of the contract when they leave no doubt as to the intention of the contracting parties).

The court did not allow the introduction for the purpose of clarifying the contract of two letters issued prior to the

1978 agreements from which CDC would have argued that MD was the party responsible for obtaining financing for the project. The documents were admitted for other purposes. The crucial language, pointed out by CDC, is as follows:

> [April] will develop the project and sell the houses to [CDC] who in turn will sell the houses to individual persons. The number of houses April will sell to CDC each year will be equal to the permanent mortgage financing to be provided by the Farmers Home Administration. Presently such financing has been set at 200 housing units per year."

August 14, 1978 letter from April's president to CDC's president.

This letter is not illuminating as to the intent of the parties regarding who was responsible for obtaining financing. Furthermore, USI contends that the "real" intent of the parties forms no part of the pleadings. There was, however, a conflict between the purchase and sale agreement and the loan agreement, as to who would obtain permanent commitments. For that purpose, both MD and CDC examined and cross-examined the principal officers of both entities. The import of the absence of the letters in the face of extensive testimony by the actual actors can only be described as minimal.

C. District Court Comments

CDC argues that several comments by the trial judge influenced the jury to such extent that a miscarriage of justice can be avoided only by ordering a new trial. Citing no authority in support of its requested remedy, CDC finds the harm to be self-evident. We have reviewed the transcript and we see no prejudice in any of the comments cited in appellant's brief. We therefore give this matter no further consideration.

12. Remaining claims

The remaining claims, attacking the jury findings regarding lack of reputation, damage computation, and sufficiency of the evidence relating to damages, lack merit.

For the reasons stated in this opinion, the judgments below are *affirmed.*

APPENDIX II

Opinion and Order of June 29, 1987 of the Federal District Court for the District of Puerto Rico

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Civil No. 83-2647 (JAF)
(Not for Publication)

U.S.I. PROPERTIES CORP.,

Plaintiff,

v.

M.D. CONSTRUCTION, INC. and
CORPORACIÓN DE DESARROLLO
COOPERATIVO,

Defendants.

OPINION AND ORDER

Codefendant Compañía de Desarrollo Cooperativo (CDC) moved once again for the dismissal of this case alleging lack of diversity jurisdiction. The latest motion[1] was filed on May 12, 1987, three days before commencement of trial. A hearing was held on May 14, 1987. We held in abeyance the motion to dismiss and informed the parties that we would closely monitor plaintiff's burden of establishing jurisdiction at trial. A ruling would be made at the conclusion of the presentation of evidence, to be followed by a written opinion and order. As stated, prior to this last objection to the court's jurisdiction, CDC had questioned plaintiff U.S.I. Properties Corp. (USI)'s claim of diversity

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[1] The motion is entitled "Motion for Realignment of Parties and to Dismiss for Lack of Diversity Jurisdiction, pursuant to 28 U.S.C. sec. 1359 and for Presenting a Non-Existent Case or Controversy." A second matter raised is that M.D. Construction, Inc. (MD) is the alter-ego of an MD-related corporation, April Industries, Inc. (April), and that the corporate veil must be pierced, thus causing April to be the real party in interest. No evidence to this effect was presented by CDC.

of citizenship under 28 U.S.C. sec. 1332(c). The previous motion resulted in an order to show cause against plaintiff USI requesting it to bring forward evidence sustaining its allegation of having its principal place of business in New York. After voluminous filings of affidavits and memorandums of law, we entered an order on March 20, 1987, finding that

> USI Properties has established *prima facie* that diversity jurisdiction exists. Be it remembered that jurisdiction in a case before a Federal court is a matter that must be alleged and proved. Therefore, this ruling does not bar the parties from presenting evidence for and against it at trial.

See Opinion and Order, docket document No. 173.

Plaintiff, as of March 20, 1987, satisfied its burden of establishing *prima facie* that jurisdiction lies. Therefore, we allowed the case to go to trial, reserving our final ruling to have the benefit of evidence. *Accord, Loria & Weinhaus, Inc. v. H.R. Kaminsky & Sons, Inc.*, 80 F.R.D. 494 (D.N.Y. 1978); *Wells Fargo & Co. v. Wells Fargo Exp. Co.*, 556 F.2d 406 (9th Cir. 1977); *Hyle v. Continental Capital Corp.*, 575 F.Supp. 616 (D.Pa. 1983); *Central Inv. Corp. v. Mutual Leasing Associates, Inc.*, 523 F.Supp. 74 (D. Ohio 1981).

As the trial progressed, on June 11-12, 1987, we allowed CDC to call as its witness USI's vice-president Donald Alberty. Even though Alberty had been cross-examined on matters related to jurisdiction when he first testified as part of plaintiff's case, we afforded CDC a full rehearing on the matter. At such hearing,[2] counsel for CDC failed

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[2] We are at a loss regarding counsel for CDC's insistence towards letting the jury decide the question of jurisdiction. We cannot consider counsel to be ignorant of federal jurisdiction law. As a matter of fact, on the hearing held on May 14, 1987, counsel for CDC, Salvador Tió,

to prove facts supportive of their 28 U.S.C. sec. 1359 collusion allegation or as to their realignment petition. The matter remained submitted. At the conclusion of all evidence, we made a finding of jurisdiction. This opinion and order explains the ruling.

I.

It is hornbook law that 28 U.S.C. sec. 1332(c) requires complete diversity among the opposing parties to a suit. *Strawbridge v. Curtiss*, 7 U.S. 267 (3 Cranch) (1806). If a corporation is involved as a party, it is deemed a citizen of the state it is incorporated in and of the state where it has its principal place of business. *District of Columbia ex rel American Combustion, Inc. v. Transamerica Ins. Co.*, 797 F.2d 1041, 1043 (D.C. Cir. 1986).

The evidence demonstrates that in 1983 USI Properties, as a subsidiary of USI Industries, had business dealings regarding land holdings in Puerto Rico. CDC tried to prove that these Puerto Rico land holdings constituted the majority of USI Properties' real property inventory. CDC submitted into evidence the summary of operations for the year 1983 and various memorandum letters from which the following facts are proved: (a) the policy decision-making of the company transactions occurred in New York; (b) USI Properties was engaged in the business of selling land held throughout the United States, Puerto Rico, and

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insisted on the well-settled law that it was for the court to decide such matter. *E.g., Valedón Martínez v. Hospital Presbiteriano de la Comunidad, Inc.*, 806 F.2d 1128 (1st Cir. 1986) (court duty while inquiring over its subject matter jurisdiction is to afford the nonmoving party ample opportunity to secure and present evidence. An evidentiary hearing is discretionary). *Accord., Prakash v. American University*, 727 F.2d 1174 (D.C. Cir. 1984). Also, the issue of lack of jurisdiction must be decided by way of dismissal. Fed. R. Civ. P. 12(h) (3); *Hawes v. Club Ecuestre El Comandante*, 598 F.2d 698 (1st Cir. 1979) (trial court may hear and determine issues of fact as to jurisdiction by receiving oral testimony and other evidence without holding a hearing).

Canada; (c) for the year 1983, USI Properties' land holdings in Puerto Rico did not constitute the majority of its real estate inventory; (d) Durret Wilson, president of USI Properties, residing in New York, was in charge of monitoring vice-president Alberty in Puerto Rico. The fact is that where the policy decisions were made, where the administrative departments were located, and where the last income tax return had been filed was in New York. *See Topp v. Compair Incorporated, Compair Ltd., Siebe PLC and Stephens,* 814 F.2d 830 (1st Cir. 1987). Plaintiff's burden of proving its principal place of business has been satisfied. USI is a Delaware corporation. Its principal place of business was not Puerto Rico. 1 *Moore's Federal Practice* para. 0.77 [3-21] (2d ed. 1986). We now examine the facts of the case to pass upon the 28 U.S.C. sec. 1359 argument regarding jurisdiction by collusion. The facts relating to a possible realignment of parties will be examined.

II.

The broad controversy presented here is one for collection of monies and damages filed by U.S.I. Properties Corp. (USI) for alleged breach of contract by defendants M.D. Construction (MD) and by CDC. The obligations assumed among the parties stem from certain written agreements entered into on October 17, 1978 and verbal representations. The parties to the contract were USI, MD, CDC, and Royal Bank of Canada (Royal Bank). A second set of contracts were entered into between CDC and MD. The parties here are a landowner (USI), a contractor/developer (MD), and the financial entrepreneur or purchaser (CDC).[3] The simple facts are that USI owned a

[3] CDC was to obtain a loan from Royal Bank for an amount of not more than $4,500,000, and a note would be issued by MD in the amount of $5 Million to be delivered in pledge to CDC, which would then pledge to Royal Bank as a security for the payment to Royal Bank of the loan for the interim financing. This note was to be secured by a first mortgage on the parcel sold by USI to MD.

tract of land in a site located in Humacao, Puerto Rico. This land was segregated and sold to MD with a mortgage in favor of USI, constituted by Deed No. 6, subscribed before notary Federico Ramírez-Ros on October 17, 1978. USI obtained in guarantee for its outstanding purchase price a first-ranking mortgage over the property sold. Subsequently, it subordinated its secured credit to allow CDC's fountain of money, the Royal Bank, to obtain the first mortgage. USI's $1,585,000 mortgage was subordinated to a $5 Million mortgage. USI agreed to this relying on the representations made by CDC, Exh. 1 at 27; Joint Exh. 7.

At some point in time, CDC did not follow through—for whatever reasons—with its contractual obligation of purchasing the house units being built by MD. This cut off the fund flow and caused MD to default its payment obligations with USI. Thereafter, a collision of interests among all the parties ensued.

At this moment, MD was sued in the local courts by CDC.[4] At the same time, USI was extrajudicially demanding payment from MD under the promissory note. The note became due on October 16, 1983.

Confronted with these financial pressures, MD and USI entered into negotiations. USI was confronted with the fact of a second-ranking mortgage subordinated in favor of a $5 Million debt, also MD's economic situation raised serious apprehensions on USI of a possible filing in bankruptcy.[5] USI and MD agreed[6] to the following: USI would

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[4] The local judicial action has been dormant since 1983. No action of importance ever took place.

[5] Stated at hearing of May 17, 1987

[6] The agreement was subscribed on October 26, 1983, in a private document sworn before a notary public. Notarized documents are meant to be used publicly if need be. It is illogical to read from the mere execution of such notarized document the intent to collude.

file a complaint in the federal court against MD and CDC. MD would confess owing the moneys. USI would not execute such judgment against MD and hold the same in abeyance until the earlier to occur of the conclusion of said litigation by judgment, settlement or otherwise or thirty months from the date of the agreement.

In exchange for USI's agreement providing MD with financial breathing space by not executing, MD assigned USI any judgment or settlement MD and/or April may obtain in any forum and/or in the CDC or federal litigations and/or under the Ciudad Cristiana agreement (the MD/April judgment or settlement), in an amount sufficient to cover the indebtedness to USI Properties. In addition, it was agreed that the assignment of the MD/April judgment or settlement to USI Properties would be in the nature of additional collateral and not in substitution, limitation or in any way affecting the rights of USI Properties under the note, the mortgage, the guaranty and/or any rights USI Properties may have under the Ciudad Cristiana Agreement and/or arising out of or in connection with or related to the agreements and/or transactions contemplated by the parties under the Ciudad Cristiana Agreement. *See* docket document No. 234, Exh. 2.

Concurrently with the signing of the agreement, MD and April Industries, MD's guarantor, executed an assignment, whereby it assigned to USI Properties:

> [a]ll amounts recovered under the said action for monies due or to become due from CDC or any other third party liable to assignor pursuant to the Ciudad Cristiana Agreement but only to the extent of the indebtedness of assignor unto assignee as stated hereinabove, and that the *receipt* by said assignee of any payment *of such money shall be a discharge and acquittance of assignor to the extent of such payment.*

Docket document No. 234, Exh. 3 (emphasis added).

After approximately four years of litigation, codefendant CDC found these documents among USI's production of documents. Based on the language of the agreement and assignment, CDC alleges that it has proved (a) collusion among the parties to manufacture federal jurisdiction, and/or (b) that any controversy that existed between USI and MD has been rendered moot, requiring the realignment of MD as a party plaintiff. We now undertake the analysis of the merits of these legal arguments.

III.

The court's duty is to examine all facts and circumstances surrounding the execution of this type of agreement. *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941). The wording utilized in the agreement is not decisive as to the issue of manufactured jurisdiction proscribed by 28 U.S.C. sec. 1359. *Kramer v. Caribbean Mills*, 394 U.S. 823 (1969) (assignment of contract cannot federalize ordinary contract suits); *McSparran v. Weist*, 402 F.2d 867 (3rd Cir. 1968), *cert. denied*, 395 U.S. 903 (1969).

CDC alleges[7] that the only possible reason for USI, April and MD failing to disclose before this court the agreements entered into as part of the pleadings was a perception that their disclosure would defeat the diversity jurisdiction they had artificially attempted to manufacture. Docket document No. 234, at 5. The jurisdiction of the federal courts is limited not only by the provisions of Article III of the Constitution, but also by Acts of Congress. *Owen Equip. & Erection Co. v. Kroeger*, 437 U.S. 365, 378 (1978). The legislative acts herein are 28 U.S.C. secs. 1332 and 1359. The manipulative manufacturing of diversity jurisdiction

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[7] Also in issue is whether M.D. Construction is an alter ego of April Industries, which they allege to be an indispensable party. We do find that MD is not an alter ego of April. April is not an indispensable party.

created by adding a sham or straw party as part of a judicial action is forbidden under 28 U.S.C. sec. 1359.[8] J. Moore, *Federal Practice and Procedure*, sec. 1444 at 231-32. CDC, however, ignores the fact that the MD-USI assignment does not bestow on USI the rights under which it sits as plaintiff. With or without the assignment, diversity jurisdiction among the parties exists.[9] The real issue is whether the effect of the agreement between MD and USI placed them in such alliance of interest as to call for a realignment of MD and USI as plaintiffs, thus destroying the diversity requirement. *See Caribbean Mills, Inc. v. Kramer*, 392 F.2d 387 (5th Cir. 1968), *aff'd* 394 U.S. 823 (1969) (if an assignment does not divest the assignors of their interest in the lawsuit, the courts must consider the citizenship of the assignor).

IV.

Courts should prevent a simulation of federal jurisdiction. *See Owen Equip. & Erection Co.*, 437 U.S. at 376; *United States v. ITT*, 420 U.S. 223, 95 S.Ct. 926 (1975); *O'Brien v. AVCO Corp.*, 425 F.2d 1030 (2d Cir. 1969); *Bertino v. Polish Ocean Line*, 402 F.2d 863, (2d Cir. 1968). To determine the effect of matters relating to assignability, state law will control in an action based on diversity of citizenship. C. Wright, E. Miller & A. Cooper, *Federal Practice and Procedure* secs. 1544, 1556 at 647, 713 (the status of the party is normally treated as a question for the law of the forum state).

The effect of the agreement subscribed on October 26, 1983 was to reiterate the fact of MD's liability toward

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[8] Section 1359 states: "A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court."

[9] USI, plaintiff, a New York principal-place-of-business corporation, incorporated in Delaware; MD, a Puerto Rico-based and incorporated corporation, and CDC, a Puerto Rico corporation.

USI. The other contract subscribed, i.e., the assignment, would fall within the civil law figure of methods of satisfying a debt/obligation typified in Puerto Rico's Civil Code article 1129, 31 L.P.R.A. sec. 3179, subject to a "condition subsequent." *See* art. 1066, Civil Code, 31 L.P.R.A. sec. 3041. In this type of contract, the rights of the assignor will not accrue until the event therein depicted, i.e., obtention of judgment or settlement, occurs. Article 1067, Civil Code, 31 L.P.R.A. sec. 3042 (In conditional obligations, the acquisition of rights, as well as the extension or loss of those acquired, shall depend upon the event constituting the condition). *See Meléndez v. Jiménez Realty, Inc.*, 98 D.P.R. 892 (1970); *Martin v. Vector Company, Inc.*, 498 F.2d 16 (1st Cir. 1974). In the event MD obtained a judgment against CDC, as it did, the assignment entered into would acquire juridical life, being USI capable of demanding payment directly from CDC. The assignment did *not* have the effect of passing to USI the right to litigate the credit MD had against CDC. The agreements are clear and unambiguous. They all boil down to the fact that MD would eventually transfer or assign to USI litigation proceeds in the amount of its debt from any judgment awarded MD against CDC.

Under these facts we must now determine whether a rearrangement of the parties was required. In the landmark case of *City of Indianapolis v. Chase Nat. Bank*, 314 U.S. 63 (1941), the rationale which justifies realignment was expressed as follows:

> To sustain diversity jurisdiction there must exist an "actual" [citations omitted] controversy between citizens of different states, all of whom on one side of the controversy are citizens of different states from all parties on the other hand.

Here also, our duty is to "look beyond the pleadings, and arrange the parties according to their order in their sides in the dispute." *Dawson v. Columbia Ave. Sav. Fund Safe*

Deposit, 197 U.S. 178 (1905). The determination of the place a party truly occupies in a suit depends on the "collision of interest" which exists. *City of Indianapolis v. Chase Nat. Bank,* 314 U.S. at 69. Before aligning a party, the courts must make certain that the real and substantial interest in controversy is determined (i.e., dominant issue test). *Hudson v. Newell,* 172 F.2d 848 (5th Cir. 1949). It is often difficult to determine on which side of a controversy the interests of a party really lie; but that determination must be made from the actualities of the litigation. *Alexander v. Washington,* 274 F.2d 349 (5th Cir. 1960); *Commercial Comp. Serv. v. Data Point Corp.,* 641 F.Supp. 1579, 1581 (M.D. La. 1986) (realigning corporations when plaintiff controls or owns codefendant corporation). The facts forming the basis for realignment must have existed at the time of the commencement of the action. 3a J. Moore, *Federal Practice* para. 19.56.

The application of the "dominant issue" test of *City of Indianapolis* allows us to conclude that in the captioned case litigation ensued because MD was not able to develop and sell 700 houses to CDC. This gave rise to MD's default toward USI, which, because of CDC's representations, subordinated its mortgage. Here, in defining the boundaries of diversity jurisdiction, the court must be mindful of the congressional policies behind diversity jurisdiction. One of these is to afford an out-of-state plaintiff an impartial forum separated from the potential parochial tendencies local courts could have in favor of a local government-related defendant. The record of this case will reveal that this case is a typical example of litigation where reasonable men would agree that federal court would serve the purpose behind diversity jurisdiction. *Strawbridge v. Curtiss,* 7 U.S. 267 (3 Cranch) (1806); 14 C. Wright, E. Miller & A. Cooper, *Federal Practice and Procedure* sec. 3472. *See* L. Tribe, *American Constitutional Law* at 69 (1978).

Relevant to our case is whether MD, by assigning to USI the proceeds of an eventual judgment against CDC,

placed USI/MD on the same side of the fence. This did not occur. The complaint filed by USI pleaded a genuine adverse controversy between the parties. The fact that MD had subscribed an agreement recognizing its debt did not render moot USI's interest in obtaining a judicial finding of MD's liability. *E.g., Martino v. McDonalds System, Inc.*, 598 F.2d 1079 (7th Cir.), *cert. denied*, 444 U.S. 966 (1979) (consent judgment may be accompanied by judicial findings of fact and conclusions of law). The prohibition against collusive suits does not bar claims which arise out of conduct designed by the litigant to initiate litigation while minimizing possible adverse consequences where, in fact, the litigant retains an adversary interest. The contract itself did not guarantee that MD was going to pay USI, the fact is that it was a collateral given, not a payment. Between MD and USI, adverse interest was present from day one. *See Fidelity & Deposit Co. of Maryland v. City of Sheboygan Falls*, 713 F.2d 1261 (7th Cir. 1983); *American Motorist Ins. Co. v. Trane Co.*, 657 F.2d 146 (7th Cir. 1981); *Taxas Pacific Coal & Oil Co. v. Mayfield*, 152 F.2d 956 (5th Cir. 1946). "Parties will NOT be realigned if there are any substantial issues as to which the plaintiff needs relief against them." J. Moore, *supra*, para. 19.03, at 19-57 (1986). Mere mutuality of interest does not justify realignment. *American Motorist Ins. Co. v. Trane Co.*, 657 F.2d 146, 149 (7th Cir. 1981).

The plaintiff and MD, although having common strategies against CDC, indeed had different interests. USI's interest is to, in its day, execute against MD and, eventually, annul CDC's first-ranking mortgage or to recover directly from USI. MD's interest is to recover its own damages and to pay USI. Realignment is not called for under these circumstances. *City of Dawson v. Columbia Ave. Saving Fund*, 197 U.S. 178 (1905); *Dolch v. United California Bank*, 702 F.2d 178 (9th Cir. 1983) (in an estate's context); *Hopkins Erecting Co. v. Brianwood Apartments*, 517 F.Supp. 243 (E.D. Ky. 1981) (in a removal

context). Accordingly, we find that jurisdiction under 28 U.S.C. sec. 1332 lies.

IT IS SO ORDERED.

San Juan, Puerto Rico, this 29th day of June, 1987.

/s/ Jose Antonio Fuste

JOSE ANTONIO FUSTE
U. S. District Judge

APPENDIX III

Agreement of October 1983 signed by USI Properties Corp., M.D. Construction Company, Inc. and April Industries, Inc.

AGREEMENT

This Agreement made and entered into by and between USI Properties Corp (USIPROP), a corporation organized and existing under the laws of the State of Delaware duly registered and authorized to do business in the Commonwealth of Puerto Rico, herein represented by its Vice President-Operations, Donald L. Alberty, of legal age, married, executive and a resident of San Juan, Puerto Rico and M.D. Construction Company, Inc. (MD) a corporation organized and existing under the laws of the Commonwealth of Puerto Rico and April Industries, Inc. (April) a corporation organized and existing under the laws of Delaware and duly authorized to do business in the Commonwealth of Puerto Rico, both corporations represented by their President, Morris Demel, of legal age, married, executive and a resident of San Juan, Puerto Rico.

WITNESSETH

WHEREAS, MD and April issued and delivered to USIPROP a promissory note to the order of USIPROP in the principal amount of ONE MILLION FIVE HUNDRED AND EIGHTY FIVE THOUSAND DOLLARS ($1,585,000.00) (the Note) guaranteed and secured by a mortgage constituted by Deed No. 6 before Notary Public Federico Ramires Ros (the Mortgage), both instruments dated October 17th, 1978, the Note payable on or before October 16, 1983, and

WHEREAS in connection with the aforereferenced payment obligation of MD to USIPROP (the Indebtedness), April issued a guarantee in favor of USIPROP dated October 17, 1978 (the Guaranty), and

WHEREAS, MD and April have not complied with their joint and several obligation to pay the Indebtedness to USIPROP evidenced by the Note and secured by the Mortgage and the Guaranty, and

WHEREAS, M.D. and April have warranted and represented to USIPROP that the non-payment by MD of the Indebtedness as evidenced by the Note is due exclusively to the nonperformance by the Compañia de Desarrollo Cooperativo (CDC) and third parties other than USICORP, of the contractual obligations under the agreement between CDC, MD, April, the Royal Bank of Canada (Royal) and USIPROP dated October 17, 1978, and all Exhibits attached thereto of even date, pertaining to the development of the project known as Ciudad Cristiana located in the Muncipality of Humacao, Commonwealth of Puerto Rico (collectively the Ciudad Cristians Agreement) specifically and including the obligations of CDC under the Exhibits identified as the Loan Agreement and Purchase and Sale Agreement between CDC and MD of even date thereof, and

WHEREAS, MD and April have further warranted and represented to USIPROP that the Complaint filed by CDC dated October 14, 1983 against MD in the Superior Court of Puerto Rico, San Juan Section, Civil No. 83-5384 (805) on Breach of Contract, Collection of Note and Damages (the CDC Litigation) does not have any factual or legal basis and is without any merit whatsoever, and

WHEREAS on the basis of the aforereferenced warranties and representations of MD and April and other good and valuable consideration as hereinafter set forth USIPROP is willing to agree to certain conditions pertaining to the exercise of its rights under the Note, the Mortgage and the Guaranty, and generally under the Ciudad Cristians Agreement.

NOW THEREFORE, the Parties hereto agree as follow:

1. USIPROP herein agrees:

a) to commence legal action in the Federal Court against MD and CDC only and further not execute such Judgment as is rendered against MD and hold the same

in abeyance until the earlier to occur of the conclusion of the said litigation (the Federal Litigation) by judgment, settlement or otherwise or thirty (30) months from the date of this Agreement.

b) Postpone for ninety (90) days from the date hereof the commencement of any action it may take against April under the Note, the Mortgage and the Guaranty in the Superior Court of Puerto Rico (the April Litigation) and further, after commencement of such action, to hold in abeyance any judgment obtained in the said proceedings and not to execute the same until the earlier to occur of the conclusion of the CDC or Federal Litigation by judgment, settlement or otherwise or thirty (30) months from the date of execution of this Agreement.

2. MD and April shall:

a) assign in favor of USIPROP any judgment or settlement MD and/or April may obtain in any forum and/or in the CDC or Federal Litigations and/or under the Ciudad Cristiana Agreement, (the MD/April Judgment or Settlement), in an amount sufficient to cover the Indebtedness to USIPROP including USIPROP legal costs and expenses in connection with the proceedings to be commenced by USIPROP against among other, MD, April and CDC up to the sum of Sixty Thousand Dollars ($60,000.00), plus interest on the said Indebtedness at the rate of six percent (6%) per annum from the due date of the Note and until paid in full. Should MD and/or April obtain a Judgment or negotiate a Settlement against CDC and/or any third party under the Ciudad Cristiana Agreement in an amount in excess of Two Million One Hundred Thousand Dollars ($2,100,000.00), plus USIPROP legal fees and expenses, plus the basic rate of interest of six percent (6%), then in such event, the interest rate to be paid to USIPROP from the due date of the Note and until the Indebtedness is paid in full shall then be the prevailing prima rate set by Citibank, N.A., New York, for the period in question.

The Assignment of the MD/April Judgment or Settlement to USIPROP shall be in the nature of additional collateral and not in substitution, limitation or in any way affecting the rights of USIPROP under the Note, the Mortgage, the Guaranty and/or any rights USIPROP may have under the Ciudad Cristiana Agreement and/or arising out of or in connection with or related to the agreements and or transactions contemplated by the Parties under the Ciudad Cristiana Agreement.

b) not to file, against USIPROP, directly and/or through any third party, at any time, in any forum, any claim, counterclaim or cross claim on the cause of action to be asserted in the April, CDC or Federal Litigations and/or under the Ciudad Cristiana Agreement and/or arising out of or in connection with or related to the agreements and/or transactions contemplated by the Parties under the Ciudad Cristiana Agreement.

c) waive any and all rights they may have as a result of USIPROP inaction in filing or prosecuting in earnest its claim against April and/or MD.

3. This Agreement and the covenants and accords made hereunder shall be effective on the day of its execution by the Parties hereof.

4. The Parties hereto represent and warrant:

a) That they are corporations authorized to do business under the Laws of the Commonwealth of Puerto Rico and/or in their State of Incorporation, are in good standing in the Commonwealth of Puerto Rico and/or in their State of Incorporation and that they have requisite power and authority to own their properties and to carry on their business as now conducted and carried out.

b) That they have the capacity, power and authority to execute, deliver and carry out this Agreement, which capacity, power and authority does not require the consent of a third party to this Agreement, and that they have

the capacity and have been duly authorized by their governing body to so act and that this Agreement is enforceable in accordance with its terms.

5. This Agreement shall be construed and its terms and conditions enforceable within the jurisdiction and in accordance with the laws of the Commonwealth of Puerto Rico.

IN WITNESS WHEREOF, the Parties hereto have duly executed this Agreement this ___26th ___day of October, 1983.

M.D. CONSTRUCTION COMPANY, INC.

By: /s/ Morris Demel
Morris Demel-President

APRIL INDUSTRIES, INC.

By: /s/ Morris Demel
Morris Demel-President

USI PROPERTIES CORP.

By: /s/ Donald L. Alberty
Donald L. Alberty
Vice President-Operations

Affidavit No. -1937-

Subscribed before me by Morris Demel in his capacity as President of April Industries, Inc. and M.D. Construction Company, Inc. and by Donald L. Alberty in his capacity as Vice President-Operations of USI Properties Corp., both of the personal circumstances hereinbefore stated, to me personally known, in San Juan, Puerto Rico, this -26th- day of October, 1983.

/s/ ????
Notary Public

APPENDIX IV

Complaint filed on October 27, 1983 by USI Properties Corp., as plaintiff against M.D. Construction Company, Inc. and Compañía de Desarrollo Cooperativo (C.D.C.)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Civil Number 83-2647 (RA)
(Plaintiff Demands Trial By Jury)

USI PROPERTIES CORP.

Plaintiff

Vs.

M.D. CONSTRUCTION COMPANY, INC. and COMPAÑIA DE DESARROLLO COOPERATIVO

Defendants

Filed Oct. 27, 1983

COMPLAINT

Comes Now plaintiff through the undersigned attorney and alleges and prays as follows:

I. *Jurisdiction of the Court:*

Jurisdiction of this court is vested by 28 USC Section 1332 inasmuch as there is diversity of citizenship and the controversy exceeds $10,000.00, exclusive of interests and cost since plaintiff, USI Properties Corp. is a Delaware Corporation with its principal office in the state of New York and defendants M.D. Construction Company, Inc. and Compañia de Desarrollo Cooperativo are corporations organized pursuant to the laws of the Commonwealth of Puerto Rico with principal offices in the City of San Juan, Puerto Rico.

II. *First Cause of Action:*

1. Pursuant to the provisions of Deed Number Six (6) executed on October 17, 1978 before Notary Public Federico Ramírez Ros, USI Properties

Corp. (USI) sold to M.D. Construction Company, Inc. (M.D.) a certain parcel of land which was specifically described therein, for the sum of $1,224,230.70. A copy of the aforestated document is attached hereto as Exhibit 1.

2. At the time of the aforestated closing USI received from M.D. payment of the sum of $5,000.00 to be applied towards the purchase price and also received a note in the face amount of $1,585,000.00 payable on or before October 16, 1983 which face amount includes the unpaid portion of the purchase price and interest from the date of issuance of the note until October 16, 1983 at the rate of six percent (6%) per annum. A copy of the aforestated document is attached hereto as Exhibit 2.

3. The aforestated note was secured by a mortgage on the parcel of land which was the object of the purchase-sale agreement. Said mortgage was constituted pursuant to the provisions of Deed Number Six (6) executed on October 17, 1978 before Notary Public Federico Ramírez Ros.

4. The aforestated mortgage was duly recorded in the Registry of Property of Puerto Rico.

5. Plaintiff is still the holder of note heretofore mentioned.

6. M.D. has defaulted in its obligations arising out of the aforestated note since it has not paid to the plaintiff the amount evidenced by said note. As of this date M.D. owes to the plaintiff the sum of $1,201,600.00 on account of the aforestated as principal and interest which monies are presently due and payable.

7. In addition of the aforestated, pursuant to the provisions of the above mentioned note, MD also

owes to the plaintiff the agreed upon sum of $60,080.00 as a liquidated amount to cover costs and expenses (including attorney fees) on account of plaintiff being forced to resort to the Courts for the collections of the monies due to it.

8. On various ocassions the plaintiff has requested from M.D. the payment of the outstanding balance of the note which is the subject matter of this action.

III. Second Cause of Action:

1. On October 17, 1978, USI, M.D. and Compañia de Desarrollo Cooperativo (CDC) among others, entered into an agreement whereby CDC agreed to buy 700 houses to be constructed on the parcel of land sold by USI to M.D., to provide construction, financing to M.D., to provide permanent financing for the ultimate purchasers of the houses, all of which would result in the repayment to the plaintiff of the monies due it, pursuant to the allegations contained in the first cause of action. A copy of the aforestated document is attached hereto as Exhibit 3.

2. In the aforestated agreement it was represented to the plaintiff by CDC that it would not default in and would not modify the obligations assumed by it to finance the development of the parcel heretofore referred to and the obligation to purchase from M.D. the seven hundred residential units to be built and the re-payment provisions to the plaintiff contained in the agreement dated October 17, 1978.

3. As a result of the aforestated representations, the plaintiff consented to the subordination of its $1,585,000.00 note and mortgage securing same to a note and mortgage securing same in the

amount of $5,000,000.00 issued by MD to Compañia de Desarrollo Cooperativo.

4. Compañia de Desarrollo Cooperativo defaulted in the performance of its obligations to finance the development of the parcel of land mentioned before and to purchase the residential units from M.D. and therefore prevented the repayment provisions of plaintiff's heretofore mentioned credit.

5. The breach by Compañia de Desarrollo Cooperativo of the obligations arising out of the agreement dated October 17, 1978 has caused plaintiff's security to be imperiled since on account of CDC's representations and assumed obligations, the mortgage securing plaintiff's $1,585,000.00 note was subordinated and it now has second rank in priority in the Registry of Property. In addition, CDC's default has caused the repayment provisions of the agreement to become inefective and thus has caused a large portion of plaintiff's credit to remain unpaid as of this date.

6. As a result of the aforestated, upon execution of the mortgage securing the note of which plaintiff is the holder, the owner of the property by public sale, will be obliged to pay the principal and interest due and payable pursuant to the $5,000,000.00 face amount note issued by MD to Compañia de Desarrollo Cooperativo.

7. CDC's breach of its obligations arising out of the October 17, 1978 agreement have caused the debt to plaintiff to remain unpaid, thereby damaging and imperilling plaintiff's standing as a creditor and therefore such breaches have caused CDC to become liable to the plaintiff for the full

amount of its credit as stated in the First Cause of Action.

IV. *Prayer for Relief:*

Wherefore it is respectfully requested from the Court that a judgment be entered as follows:

1. Against M.D. to pay to plaintiff the sum of $1,201,600.00 as principal and interest due as of this date as alleged herein in the First Cause of Action.

2. Against M.D. to pay to plaintiff all interests that may accrue hereafter until a full and complete payment of plaintiff's credit is made.

3. Against M.D. to pay to plaintiff the sum of $60,080.00 which is the agreed upon amount to be paid to plaintiff as liquidated damages to cover costs and expenses (including attorney fees) on account of plaintiff having to resort to judicial proceedings to collect the credit due to it.

4. Against Compañia de Desarrollo Cooperativo to pay to plaintiff the monies owed by M.D. to plaintiff.

5. Granting any other remedy to which plaintiff may be entitled.

Respectfully submitted in San Juan, Puerto Rico, this ___day of October, 1983.

LEDESMA, PALOU & MIRANDA
Banco de Ponce Bldg.
11th Floor-Suite 1103
Hato Rey, Puerto Rico 00918
Tel: 754-6300

By: /s/ Ruben T. Nigaglioni
Ruben T. Nigaglioni

APPENDIX V

Filed on October 31, 1983 by
Cross Claim filed on October 31, 1983
M.D. Construction Company, Inc. against
Compañía de Desarrollo Cooperativo
(C.D.C.)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

CIVIL NO. 83-2647 (RA)

USI PROPERTIES CORP.,

Plaintiff

vs.

M.D. CONSTRUCTION COMPANY, INC. and COMPAÑIA DE DESARROLLO COOPERATIVO,

Defendants

ACTION FOR:

COLLECTION OF MONIES; DAMAGES; CONSPIRACY, FRAUD, DECLARATORY JUDGMENT, LOSS OF REPUTATION, CREDIT, etc.

CROSS CLAIMANT DEMANDS TRIAL BY JURY

CROSS CLAIM OF CO-DEFENDANT M.D. CONSTRUCTION COMPANY, INC.

TO THE HONORABLE COURT:

Cross Claimant, M.D. Construction Company, Inc., through its undersigned attorneys, cross claiming against cross defendant Compañia De Desarrollo Cooperativo, respectfully alleges and prays as follows:

ALLEGATIONS COMMON TO ALL CROSS CLAIMS

1. The jurisdiction of this Court is invoked pursuant to the jurisdiction of the principal action herein, and the con-

troversy exceeds the sum of $10,000.00, exclusive of interests and costs.

2. October 17, 1978 Cross Claimant purchased from plaintiff a parcel of land, pursuant to Deed Number Six before Notary Federico Ramirez Ros, comprising approximately 235 cuerda located in Humacao, Puerto Rico (the "Property").

3. The said Property was purchased by Cross Claimant from plaintiff on October 17, 1978 subject to a purchase money mortgage in the amount of $1,585,000.00 ("P.M. Mortgage"), on which there is presently a balance outstanding of $1,201,600.00.

4. On October 17, 1978 Cross Claimant and Cross Defendant entered into a contract denominated "Purchase And Sale Agreement whereby Cross Defendant agreed to purchase from Cross Claimant 700 housing units and lots on which the housing units were to be constructed ("Units"), in a housing project to be developed and constructed by Cross Claimant on the Property, known as the "Ciudad Cristiana Project".

5. The minimum agreed purchase price per Unit, dependent upon the size of the lot was $27,800.00, with Cross-Defendant having agreed to take delivery of, and make payment for, the Units, when delivered by Cross-Claimant to Cross-Defendant.

6. Pursuant to a loan agreement between Cross Claimant and Cross Defendant dated October 17, 1978 ("Loan Agreement") Cross Defendant agreed to make progress payments to Cross Claimant during development and construction of the Ciudad Cristiana Project.

7. Cross Defendant, pursuant to the Purchase And Sale Agreement also agreed to provide the permanent financing to the ultimate purchasers of the Units.

8. Pursuant to an agreement dated October 17, 1978 among plaintiff, Cross Claimant, Cross Defendant, April

Industries, Inc. ("April") and Royal Bank of Canada ("Royal Bank") (hereinafter referred to as the "Multi-Party Agreement"), plaintiff subordinated its P.M. Mortgage to a $5,000.000.00 mortgage on the Property to secure a demand note issued by Cross Claimant and delivered to Cross Defendant, which Cross Defendant pledged to Royal Bank to secure the repayment by Cross Defendant of the monies Cross Defendant borrowed from Royal Bank to finance the development and construction of the Ciudad Cristiana Project.

9. It was also further agreed in the Multi-Party Agreement that USI would be paid its P.M. Mortgage from the proceeds of the sale of each of the Units to Cross Defendant.

AS AND FOR A FIRST CROSS CLAIM

10. Cross Claimant repeats, reiterates and realleges all the allegations contained in paragraphs numbered "1" through "9", inclusive hereof, with the same force and effect as though more fully set forth herein at length.

11. On or about the 7th day of July 1982 Cross Claimant delivered 53 Units to Cross Defendant on which Units Cross Defendant refused to close title, and refused to make payment therefor to Cross Claimant, totalling a purchase price of $1,868,674.00.

12. That as at the aforestated date of July 7, 1982, and up to the present time Cross Claimant delivered to Cross Defendant a total of 480 Units, leaving a balance of 220 Units to be constructed and delivered by Cross Claimant to Cross Defendant.

13. Cross Defendant refused to permit Cross Claimant to continue with the development and construction of the Ciudad Cristiana Project, and informed Cross Claimant that it would not accept the delivery from, or make payment of the purchase price to Cross Claimant of any further Units.

14. As a result of the breach by Cross Defendant of the aforementioned Agreements, Cross Claimant has suffered damages in an amount in excess of $7,000,000.00; including, without limitation thereof, the sum of $217,194.00 which Cross Defendant refused to pay to Cross Claimant upon delivery to Cross Defendant of the 53 Units aforementioned in paragraph 11 hereof, Cross Claimant's loss of profits on the balance of the 220 Units which Cross Defendant refused to permit Cross Claimant to develop, construct and deliver to Cross Defendant, interest continued to be charged by Cross Defendant to Cross Claimant, various interest losses of Cross Claimant on the Ciudad Cristiana Project, and interest accruing on the indebtedness of Cross Claimant to USI.

AS AND FOR A SECOND CROSS CLAIM

15. Cross Claimant repeats, reiterates and realleges all the allegations contained in paragraphs numbered "1" through "14", inclusive hereof, with the same force and effect as though more fully set forth herein at length.

16. Upon information and belief, pursuant to, and in furtherance of, a recent fraudulent plan, scheme and conspiracy of Cross Defendant and the Government Development Bank For Puerto Rico, and certain of their officials and/or agents, acting on their behalf, effectuated the said fraudulent plan, scheme and conspiracy as hereinafter described.

17. Upon information and belief during the time of the acts complained of herein, the Cross Defendant, without the knowledge of Cross Claimant, wrongfully and secretely joined and fraudulently confederated, connived and conspired together in formulating the deliberate design, intent and purpose to defraud Cross Claimant of the monies due Cross Claimant from Cross Defendant, by fabricating various claims by Cross Defendant against Cross Claimant;

which fabricated claims of Cross Defendant are entirely without merit.

18. Upon information and belief, pursuant to the said conspiracy, which still exists, and as part thereof, and intending to take advantage of Cross Claimant by the said acts of conspiracy, fraud, deceit and duplicity, Cross Defendant did, with intent and malice aforethought effectively deceive, mislead and defraud Cross Claimant as aforestated and by the conspirators causing the $5,000,000.00 Mortgage Note held by Royal Bank in pledge, as aforementioned to be assigned to the Government Development Bank, through subterfuge, ostensibly * * * the Government Development Bank as a holder in due course when in reality the title of holder in due course by the Government Development Bank is spurious and fictitious; the conspirators intending by said acts to attempt to defeat the claims of Cross Claimant against Cross Defendant.

19. As a result thereof, Cross Claimant has sustained great losses and damages which have been inflicted upon it by virtue of the said conspiracy and fraudulent acts done in pursuance thereof; that upon information and belief, the said conspirators intended that Cross Claimant should sustain great losses and damages as a result of their conspiracy and the fraud practiced upon Cross Claimant, and that the monies which Cross Claimant lost by reason thereof, the Cross Defendant intended to gain and did gain for itself and become unjustly enriched.

20. By reason of the foregoing, plaintiff has been damaged in a sum in excess of $7,000.000.00.

AS AND FOR A THIRD CROSS CLAIM

21. Cross Claimant repeats, reiterates and reallages all the allegations contained in paragraphs numbered "1" through "20", inclusive hereof, with the same force and effect as though more fully set forth herein at length.

22. Cross Claimant will be without any remedy in the premises unless this Court declares and adjudicates that the $5,000,000.00 Mortgage Note aforementioned is null and void so that the conspirators be not unjustly enriched by their acts as aforestated, and that the said Mortgage Note be cancelled as of record.

AS AND FOR A FOURTH CROSS CLAIM

23. Cross Claimant repeats, reiterates and realleges all the allegations contained in paragraphs numbered "1" through "22", inclusive hereof, with the same force and effect as though more fully set forth herein at length.

24. Cross Claimant has been actively engaged and has devoted years and much industry, time, effort and money in the development and construction business; and has achieved a marked degree of success in its business; and has enjoyed the esteem and respect of persons engaged in the same business and in other businesses; and Cross Claimant's reputation of honesty and integrity is excellent beyond question.

25. Upon information and belief, the acts of the conspirators aforementioned and the commencement of a legal action by Cross Defendant against Cross Claimant in the Superior Court Puerto Rico, San Juan Section, under Civil No. 83-5384 (805) the publication and circulation of which among various persons * * * the public, have defamed and decimated the reputation and credit * * * Cross Claimant.

26. The published and circulated statements by Cross Defendant concerning Cross Claimant as aforementioned are false, defamatory, untrue and fabricated.

27. As a direct and proximate result of the publication and circulation of the false, scurrilous, irresponsible and defamatory matter by the aforementioned conspirators and specifically the aforementioned litigation by Cross Defendant against Cross Claimant, as aforementioned, the

name of Cross Claimant has been brought into disrepute and its reputation and honesty and integrity in its business dealings and its financial credit have been irreparably damaged and besmirched, and Cross Claimant has suffered damages in the sum of $2,000,000.00.

CROSS CLAIMANT DEMANDS TRIAL BY JURY.

WHEREFORE, Cross Claimant demands judgment against Cross Defendant as follows:

1. In the sum in excess of $7,000,000.00 in the First and Second Cross Claims.

2. Declaring and adjudicating that the $5,000,000.00 Mortgage Note assigned and transfered to the Government Development Bank is null and void and that the same be cancelled as of record in the pertinent Registry of Property.

3. In the sum of $2,000,000.00 in the Fourth Cross Claim.

4. In the sum of $350,000.00 for costs and attorney fees; plus interest a the maximum legal rate on all amounts recovered from due dates thereof.

5. For such other and further relief as this Court may deem just and proper in the premises.

DATED: San Juan, Puerto Rico, this 31 day of October 1983.

WOODS WOODS & MAYO

BY: /s/ Harry E. Woods
HARRY E. WOODS
Attorneys for Cross Claimant
P.O. Box 13802
Santurce, Puerto Rico 00908
Tel. (809) 754-7700

I CERTIFY that on this same date I forwarded to Ruben T. Nigaglioni, Esq. of Ledesma, Palou & Miranda, Esqs.,

via U.S. Mail, Postage Prepaid, to Banco de Ponce Building, 11th Floor, Suite 1103, Hato Rey, Puerto Rico 00918, copy of the within Cross Claim of Co-Defendant M.D. Construction Company, Inc.

/s/ Harry E. Woods
HARRY E. WOODS

APPENDIX VI

Order of November 30, 1988 of the First Circuit Court of Appeals denying Petition for Rehearing

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 87-1721

U.S.I. PROPERTIES, CORP.,
Plaintiff, Appellee,

v.

M.D. CONSTRUCTION COMPANY, INC., ET AL.,
Defendants, Appellees.

COMPANIA DE DESARROLLO COOPERATIVO,
Defendant, Appellant.

Before

Campbell, *Chief Judge,*

Coffin, Bownes, Breyer, Torruella and Selya, *Circuit Judges.*

ORDER OF COURT

Entered: November 30, 1988

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be hereby denied.

By the Court:
Francis P. Scigllano
Clerk.

[cc: Messrs: Ramirez Lavendeno, Nigaglioni and Woods]

Supreme Court, U.S.
FILED
APR 24 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1428

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

COMPAÑIA DE DESARROLLO COOPERATIVO,
Petitioner,

v.

U.S.I. PROPERTIES, CORP.
M.D. CONSTRUCTION, INC.,
Respondents.

RESPONDENT M.D. CONSTRUCTION, INC.'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT, M.D. CONSTRUCTION, INC.

April 24, 1989

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

BEST AVAILABLE COPY

COUNTER-STATEMENT OF ISSUES

WHETHER THE OPINION OF THE FIRST CIRCUIT (a) REJECTING PETITIONER'S ARGUMENT THAT RESPONDENTS HAVE COLLUSIVELY CONFERRED DIVERSITY JURISDICTION UPON THE DISTRICT COURT, AND (b) REJECTING PETITIONER'S ARGUMENT THAT REALIGNMENT OF THE RESPONDENTS IS APPROPRIATE BECAUSE THERE IS NO SUBSTANTIAL CONTROVERSEY BETWEEN THEM, CONFLICTS WITH THE DECISIONS OF OTHER CIRCUIT COURTS OR OF THIS COURT.

PARTIES TO PROCEEDINGS BELOW

USI Properties Corp. was the plaintiff before the District Court for the District of Puerto Rico and the plaintiff-appellee before the Court of Appeals for the First Circuit.

MD Construction, Co. Inc., Respondent herein, was a codefendant and crossclaimant before the District Court for the District of Puerto Rico and a defendant-appellee before the Court of Appeals for the First Circuit.

Both respondents are the parties in interest to the relief afforded below.

Compañia de Desarrollo Cooperativo, Petitioner herein, was a codefendant and crossclaimant before the District Court for the District of Puerto Rico and defendant-appellant before the Court of Appeals for the First Circuit.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1428

COMPAÑIA DE DESARROLLO COOPERATIVO,
Petitioner,

v.

U.S.I. PROPERTIES, CORP.
M.D. CONSTRUCTION, INC.,
Respondents.

RESPONDENT M.D. CONSTRUCTION, INC.'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

TO THE HONORABLE COURT:

COMES NOW RESPONDENT, M.D. CONSTRUCTION, INC. ("MD"), through its undersigned counsel, and respectfully prays that the Petition for Writ of Certiorari requested by Petitioner Compañia de Desarrollo Cooperativo ("CDC") in this case be denied for the reasons stated and argued in the instant brief.

OPINION BELOW

The Opinion of the Court of Appeals for the First Circuit is reported as *U.S.I. Properties Corp. v. M.D. Const. Co., Inc.*, 860 F.2d 1 (1st Cir. 1988) and appears as Appendix I hereto. The Opinion and Order

of the District Court for the District of Puerto Rico is not reported and appears as Appendix II hereto.

STATEMENT OF THE CASE

Nature of the Case

In the instant case this Honorable Court has been requested by the Petitioner to issue a Writ of Certiorari to review the Judgment and Opinion of the United States Court of Appeals for the First Circuit entered on October 25, 1988, which affirmed the Judgment of the U.S. District Court for the District of Puerto Rico entered on June 30, 1987.

The Petitioner contends that the decision of the First Circuit "has virtually eradicated the doctrine [of realignment]", Petitioner's petition at 13. Petitioner argues that its version of the facts demonstrates collusion on the part of Respondents USI and MD intended to confer jurisdiction upon the Federal Court which it would otherwise not have, and that therefore the District Court should have divested itself of jurisdiction. Moreover, the Petitioner argues that, by virtue of an agreement and assignment entered into by USI Properties Corp. ("USI") and MD prior to the commencement of the litigation, there were no significant controversies or substantial issues then still pending between them and, therefore, realignment of USI and MD was appropriate. Petitioner's position on these questions has been rejected by both the District Court (see Opinion and Order dated June 29, 1987, Respondent's Appendix II at 24a) and the Circuit Court (see Opinion of October 25, 1988, Respondent's Appendix I at 5a to 10a). It should be noted that

after these questions were briefed extensively before the District Court, the trial judge reserved his decision until after all of the evidence had been presented at the trial and the jury had reached its verdict.[1]

The central theme of CDC's Petition is that diversity must fall because there was collusion between

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[1] In his Opinion and Order of June 29, 1987, (Respondent's App. II) the District Court Judge in discussing CDC's challenge to the diversity jurisdiction, stated:

"After voluminous filings of affidavits and memorandums of law, we entered an order on March 20, 1987, finding that

> USI Properties has established prima facie that diversity jurisdiction exists. Be it remembered that jurisdiction in a case before a Federal court is a matter that must be alleged and proved. Therefore, this ruling does not bar the parties from presenting evidence for and against it at trial.

See Opinion and Order, docket document No. 173.

Plaintiff, as of March 20, 1987, satisfied its burden of establishing prima facie that jurisdiction lies. Therefore, we allowed the case to go to trial, reserving our final ruling to have the benefit of evidence. *Accord, Loria & Weinhaus, Inc. v. H.R. Kaminsky & Sons, Inc.*, 80 F.R.D. 494 (D.N.Y. 1978); *Wells Fargo & Co. v. Wells Fargo Exp. Co.*, 556 F.2d 406 (9th Cir. 1977); *Hyle v. Continental Capital Corp.* 575 F. Supp. 616 (D. Pa. 1983); *Central Inv. Corp. v. Mutual Leasing Associates, Inc.*, 523 F. Supp. 74 (D. Ohio 1981).

As the trial progressed, on June 11-12, 1987, we allowed CDC to call as its witness USI's vice-president Donald Alberty. Even though Alberty had been cross-examined on matters related to jurisdiction when he first testified as part of plaintiff's case, we afforded CDC a full rehearing on the matter. At such hearing, counsel for CDC failed to prove facts supportive of their 28 U.S.C. sec. 1359 collusion allegation or as to their realignment petition. The matter remained submitted. At the conclusion of all evidence, we made a finding of jurisdiction."

MD and USI, or that diversity is lacking because there are no significant controversies between USI and MD and therefore they should be realigned. The First Circuit rejected CDC's thesis, and CDC argues that this rejection places the First Circuit in conflict with the decisions of the other Circuits. (See last sentence of Petitioner's brief, at page 14 of the Petition.)

CDC's basic premise is incorrect. Both the District Court of Puerto Rico and the First Circuit have analyzed the facts and properly applied the pertinent rules and controlling cases to those facts. Decisions in realignment and collusion cases invariably turn on very specific situations. The instant case is no exception. What the First Circuit has done is to apply the accepted, long-standing realignment and collusion rules to the specifics of this case. Such an application in no way conflicts with the decisions of this Court or of other Circuits. Petitioner's own brief points out no specific conflict; rather it takes issue with the application of the rule based on its own interpretation of facts that it unsuccessfully argued before both the District and Circuit Courts.

Counter-Statement of Facts

On October 17, 1978 USI, MD and CDC, as well as April Industries, Inc. ("April"),[2] the Government Development Bank for Puerto Rico ("GDB") (the fiscal agent for CDC) and the Royal Bank of Canada ("Royal Bank") entered into a series of agreements (the "October 17, 1978 Agreements").

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[2] April was only a guarantor of the obligations of MD. CDC elected not to bring April into this litigation.

USI sold MD a parcel of land comprising approximately 84 cuerdas,[3] located in Humacao, Puerto Rico (the "Property"), upon which Property the Ciudad Cristiana Project ("Project"), was constructed by MD. The purchase price was $1,224,230.70, with a down payment of $5,000.00 and the deferred balance, which together with interest thereon to the maturity date of October 16, 1983, totalled $1,585,000.00, which was evidenced by a mortgage promissory note secured by a purchase money first mortgage on the Property (the "USI PM Mortgage")

Amongst the October 17, 1978 Agreements was a Purchase and Sale Agreement whereby CDC agreed to purchase from MD 700 housing units of the Project which MD agreed to construct on the Property, the delivery of the units to be in groups of 40 or less per month. CDC agreed to sell the 700 units which it had committed itself to purchase from MD, to 700 persons or families. CDC agreed to provide the financing for the Project and to purchase and to pay MD for the 700 units within 60 days after delivery by MD to CDC of such units with use permits, in accordance with the schedule of payments of the Purchase and Sale Agreement.

Also amongst the October 17, 1978 Agreements was the Loan Agreement between CDC and MD whereby CDC agreed to provide $4,500,000.00 to MD for the interim financing of the Project. MD executed a $5,000,000.00 promissory mortgage note which MD gave in pledge to CDC (the "MD Note"), payment of which was secured by a second mortgage on the Property (the "MD Pledged Mortgage").

---

[3] An acre is equal to approximately 1.1 cuerdas.

In addition, amongst the October 17, 1978 Agreements was what has been termed the "Multi-Party Agreement" amongst Royal Bank, MD, CDC, GDB and April whereby Royal Bank agreed to lend to CDC the monies required for the interim financing of the 700 units of the Project, and CDC pledged the MD Note to Royal Bank.

Royal Bank, however, insisted that, before disbursing the interim financing of the Project, it be secured by a first lien on the Property. CDC made certain representations to USI to induce USI to subordinate its USI P M Mortgage to the MD Pledged Mortgage, which USI did, in reliance upon such representations.

CDC breached its representations to USI and MD and committed numerous tortious acts and breaches of contract in connection with the October 17, 1978 Agreements. (See, for example, the jury's verdict, Respondent's Appendix VI, which is discussed hereinbelow.) USI was not paid the principal amount of $1,200,700.00 on the subordinated USI P M Mortgage, and MD was injured by the actions of CDC, which included, amongst numerous others, CDC's unilaterally paralyzing further construction of the Project after only 481 units had been constructed and delivered by MD, and CDC's failing to obtain permanent financing for the majority of the units in accordance with its contractual obligations to MD.

On October 26, 1983 (more than five years after the October 17, 1978 Agreements which gave rise to this litigation), USI, MD and April entered into an Agreement and Assignment. On that date, MD owed USI the balance of the USI P M Mortgage ($1,200,700), payment of which had been guaranteed by April. As a result of the breaches by CDC and

specifically the unilateral paralyzation and termination of the Project by CDC in early 1982, MD was unable to pay off the USI P M Mortgage, and CDC ceased making the installment payments in reduction of the said mortgage. Accordingly, meetings between USI, MD and April and their attorneys took place, which culminated in the October 26, 1983 Agreement and Assignment. USI was fearful that if it brought in April (which was only a guarantor) as a party defendant in the litigation it would cause the bankruptcy of MD and of April and thus, USI would completely lose the balance of its PM Mortgage which it had subordinated to Royal Bank. Thus to obviate the risk of MD and April's bankruptcy and the loss of the balance of its P M Mortgage, USI, April and MD entered into the Agreement and Assignment, which led to benefits derived by all the parties thereto:

a. USI feared instituting its action against MD and CDC (a public corporation supported by the Puerto Rico government) in the *local court before a judge whose salary is paid by the Puerto Rico Government;*[4]

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[4] As the District Court Judge noted in his Opinion and Order of June 29, 1987 (Respondent's Appendix II at 31a):

> "Here, in defining the boundaries of diversity jurisdiction, the court must be mindful of the congressional policies behind diversity jurisdiction. One of these is to afford an out-of-state plaintiff an impartial forum separated from the potential parochial tendencies local courts could have in favor of a local government-related defendant. The record of this case will reveal that this case is a typical example of litigation where reasonable men would agree that federal court would serve the purpose behind diversity jurisdiction. *Strawbridge v. Curtiss* 7 U.S. 267 (3 Cranch) (1806); 14 C.

and instead, by commencing this suit in the U.S. District Court before a jury, the fears of USI were assuaged; moreover, a quicker disposition of the case would take place in the Federal Court, and in the English language.

b. MD and April, knowing that they owed the money to USI, admitted such debt to USI, agreed not to contest such USI claim against MD and not to interpose spurious defenses or counterclaims in this suit.

c. MD and April were glad to have a "breathing period" of 30 months or until the conclusion of this litigation, before execution of the USI judgment against MD; MD and April thus obviating the necessity of filing petitions in bankruptcy.

d. USI received additional collateral security from MD and April through an assignment by them to USI of any judgment or settlement received by them from CDC, but only *up to the amount of the debt owed to USI* plus $60,000 attorneys fees and costs, so as to protect USI from any prior attachment of such judgment of MD against CDC.

e. USI also received the additional benefit of the interest rate increase which MD and April agreed to for the additional "breathing period" of time mentioned above.

The factors enumerated above which led to the Agreement and Assignment, were practical, logical, necessary and legitimate, *and not collusive.* There was

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Wright, E. Miller & A. Cooper, *Federal Practice and Procedure* sec. 3472. See L. Tribe, *American Constitutional Law* at 69 (1978)."

no planning to, nor did USI, MD and April, "manufacture" the kind of jurisdiction prohibited by 28 USC 1359. This Agreement and Assignment was not secretive or "subrosa". There was no requirement to disclose such Agreement and Assignment. The only relationship existing between USI and MD was that of seller/mortgagee and buyer/mortgagor pursuant to the Purchase Agreement, with April as guarantor of the purchase price.

The Agreement did not create the Court's jurisdiction, since jurisdiction existed without the Agreement and Assignment. In any event USI could have brought its action against CDC alone in the Federal Court, since diversity jurisdiction existed, USI being a New York citizen and CDC being a Puerto Rico citizen, and CDC and MD being jointly and severally liable to USI pursuant to their representations under the Multi-Party Agreement (as the District Court Judge observed in his Opinion and Order of June 29, 1987, Respondent's App. II at page 29a and at page 29a, n.9.

The jury's verdict was rendered on June 19, 1987 and is included here as Respondent's App. VI. In the verdict the jury found (1) that CDC violated the terms and conditions of the October 17, 1978 Agreements, as they pertained to USI's subordinated mortgage over the Property where the Ciudad Cristiana Project was built, (2) that as a result thereof USI was entitled to recover over $1,400,000, (3) that CDC violated the terms and conditions of the October 17, 1978 Agreements as they pertained to MD, (4) that CDC incurred in negligence regarding its contractual and business relationships with MD, and (5) that MD suffered over $11,000,000 in damages. In addition, amongst its other

findings, the jury exonerated MD of fraudulent representations that CDC had alleged MD to have made.

REASONS FOR DENYING THE PETITION

I. THE REJECTION BY THE FIRST CIRCUIT OF PETITIONER'S ARGUMENT THAT RESPONDENTS HAVE COLLUSIVELY CONFERRED DIVERSITY JURISDICTION UPON THE DISTRICT COURT, DOES NOT CONFLICT WITH THE DECISIONS OF OTHER CIRCUIT COURTS OR OF THIS COURT.

In discussing the October 26, 1983 Agreement, Petitioner states the following on pages 3 and 4 of its Petition:

> "This agreement was never disclosed voluntarily to the District court.
>
> * * *
>
> In 1987 CDC discovered the existence of the Agreement of October 26, 1983 between USI, April and MD which had never been disclosed by said parties."

Petitioner's statements are incorrect. It is important to note that Petitioner has been leveling this charge at MD and USI throughout the history of this case, both before the District Court and the Circuit Court as well as now before this Court. Neither the District Court nor the Circuit Court accepted these charges.[5]

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[5] As a matter of fact, the Circuit Court Opinion of October 25, 1988 (Respondent's App. I) states in footnote 2 the following:

> "CDC proceeds to accuse opposing counsel of fraud upon the Court, which counsel for USI and MD vehemently deny. It is not the role of this Court to determine the veracity of statements by officers of

The October 26, 1983 Agreement and Assignment was provided to CDC when, in the notice of taking of Don Alberty's deposition (an officer of USI), CDC requested all documents between the parties. This is clearly reflected in the transcript of the hearing of April 7, 1987 at page 32, which is Docket No. 185 in the District Court Docket.

The October 26, 1983 Agreement and Assignment was thus provided to CDC in the *normal course* of discovery. The complaint in this case was based on a series of agreements entered into on October 17, 1978, and the conduct of the parties subsequent thereto. The complaint was not in any way based on the October 26, 1983 Agreement or Assignment.

CDC's contention that MD and/or USI for some reason did not voluntarily disclose the October 26, 1983 Agreement and Assignment, is illogical for another reason. Suppose USI had attached the October 26, 1983 Agreement and Assignment to the complaint on October 27, 1983. What would then have been before the Court—that USI had sued MD for the $1,201,700 balance of the $1,585,000.00 debt, and MD had admitted that it owed such money but that it had ascribed to CDC the responsibility and liability for same. *But these controversies actually were the exact ones which were before the District Court anyway.* These are amongst the very controversies which

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the Court, as all lawyers are. As far as we can tell, however, these allegations are without justification. It is, furthermore, highly unbecoming to allow allegations of fraud upon the court to appear as part of the substantive argumentation. Careful research and cogent reasoning, in aspersions, are the proper tools of our trade."

are contained in the pleadings, which were the subject of the trial, and which were disposed of by the jury's verdict. Thus, the presence or absence of the October 26, 1983 Agreement and Assignment would not have altered the disputes between the parties. And, ultimately, the jury did decide (exactly as MD represented in the October 26, 1983 Agreement, and thereafter contended throughout the litigation) that MD's indebtedness to USI was the fault of CDC and that CDC was liable to USI for such debt.

In its decision in the instant case the First Circuit stated:

> "The district court, relying on *Kramer v. Caribbean Mills*, 394 U.S. 823 (1969), found that arguing collusion did not assist CDC much because it is not on account of the 1983 agreement that USI is a plaintiff in this case. This case stems from the multilateral agreements that would have led to the construction of the Ciudad Cristiana project. USI is not a party brought in only to manufacture diversity jurisdiction. Neither is MD placed as a defendant due to some contrivance. MD was liable to USI under a promissory note, and had a colorable (indeed, ultimately successful) claim against CDC." Circuit Court Opinion of October 25, 1988, Respondent's Appendix I at page 8a.

The collusion charge, therefore, is without merit because USI did not need to collusively conspire with MD in order to have access to the Federal Court; USI could simply have sued MD for the money MD owed to USI. At the same time, MD, although willing

to recognize that it owed CDC certain monies, contended that CDC was at fault and, hence, the cross-claim asserted by MD against CDC. This thesis is ultimately borne out by the findings of the jury. CDC has sought to have first the District Court, then the Circuit Court, and now this Court make a finding of collusion on characterizations of fact supplied by CDC.

But the facts alleged by CDC, even when taken in the light most favorable to CDC's position, do not support a collusion thesis. This is so because there was no need for USI and MD to enter into the October 26, 1983 Agreement and Assignment in order to obtain diversity jurisdiction. Diversity of citizenship exists without the October 26, 1983 Agreement and Assignment. The claims of the various parties against each other all arise from the 1978 documents and the subsequent conduct of the parties. The citizenship of the parties was not, to use the language of this Court in *Kramer v. Caribbean Mills*, 394 U.S. 823, 829 (1969) "manufactured" in order to gain access to the Federal Courts. This citizenship existed from the inception of the relationship of the parties at the time of the October 17, 1978 Agreements and continued through the filing of the complaint. As the District Court Judge said in his Opinion and Order of June 29, 1987 (Respondent's App. II at 29a):

> "CDC, however, ignores the fact that the MD-USI assignment does not bestow on USI the rights under which it sits as plaintiff. With or without the assignment, diversity jurisdiction among the parties exists.* The real issue is whether the effect of the agreement between MD and USI placed them in such alliance of interest as to call for a realign-

> ment of MD and USI as plaintiffs, thus destroying the diversity requirement. *See Caribbean Mills, Inc. v. Kramer*, 392 F.2d 387 (5th Cir. 1968), *aff'd* 394 U.S. 823 (1969) (if an assignment does not divest the assignors of their interest in the lawsuit, the courts must consider the citizenship of the assignor).
>
> ———
>
> *[Footnote in the District Court Judge's Opinion and Order]. USI, plaintiff, a New York principal-place-of-business corporation, incorporated in Delaware; MD, a Puerto Rico-based and incorporated corporation, and CDC, a Puerto Rico corporation."

Since it was not necessary for USI to engage in collusive conduct in order to pursue the claim in the Federal Court, the remaining question is whether, as CDC urges, realignment is somehow appropriate.

II. THE REJECTION BY THE FIRST CIRCUIT OF PETITIONER'S ARGUMENT THAT REALIGNMENT OF THE RESPONDENTS IS APPROPRIATE BECAUSE THERE IS NO SUBSTANTIAL CONTROVERSY BETWEEN THEM DOES NOT CONFLICT WITH THE DECISIONS OF OTHER CIRCUIT COURTS OR OF THIS COURT.

In *American Motorists Ins. Co. v. Trane Co.*, 657 F.2d 146 (7th Cir. 1981), the court treated and disposed of several of the same arguments which Petitioner has employed in its brief before this Court. Petitioner contends that since both MD and USI believed CDC to be liable for the losses that each incurred, that therefore realignment was appropriate. The *American Motorists* decision notes that "it is the

points of substantial antagonism, not agreement, on which the realignment question must turn." *American Motorists* at 151. In *American Motorists*, the Seventh Circuit recognized that two insurers might share an interest in escaping liability to a party they both insured, and therefore a defendant insurer might join a plaintiff insurer in a motion to dismiss the insured's counterclaim where such dismissal would free them both from liability; nevertheless, it did not follow that the insurers' interests were harmonious. *American Motorists* at 150. The court found "substantial conflict" between the positions of the two insurers. The Seventh Circuit stated that "The propriety of alignment is a matter not determined by mechanical rules, but rather by pragmatic review of the principal purpose of the action and the controlling matter in dispute. *Indianapolis v. Chase National Bank* 314 U.S. 63, 62 S.Ct. 15, 86 L.Ed. 47 (1941)." *American Motorists* at 151. Thus the Court points out that "a mere mutuality of interests in escaping liability is not of itself sufficient to justify realignment." *American Motorists* at 151. This is why the realignment test—that there be no actual, substantial conflict between the parties that would justify placing them on opposite sides of the lawsuit—is not met in the instant case.

As the First Circuit did in the Opinion below in the instant case, the Seventh Circuit in *American Motorists* analyzed the positions of the parties on the basis of a "what if" approach—that is to say, what if this party were found liable and this party not liable? (See note 1 of the Opinion of the First Circuit in the instant case, Respondent's App. I).[6]

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[6] In the October 26, 1983 Agreement MD acknowledged its

Why did USI need a judgment against MD? The answer to this question not only disposes of Petitioner's realignment thesis but places the alleged collusion issue in its proper context. As the court in *Fidelity & Deposit v. Sheboygan Falls* 713 F.2d 1261, 1266 (7th Cir. 1983) noted, "so far as appears, Fidelity [plaintiff] really did want a judgment declaring [codefendant] Scotty liable to it under the indemnity agreement." As the need for a judgment was real in *Fidelity & Deposit* so, too was it real in the instant case. MD owed USI $1,201,700.00 (which was the balance due on the $1,585,000.00 indebtedness). This was acknowledged in the October 26, 1983 Agreement, which CDC alleges is collusive. But what good is a mere acknowledgment of debt from a company which is on the verge of bankruptcy? USI *needed* a

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$1,201,700.00 debt to USI; but it placed the blame for its failure to pay such debt on the shoulders of CDC. When USI subsequently sued MD and CDC, while USI was owed a debt by MD there was a very real question (which ultimately went to the jury) as to whether the debt might actually be CDC's or more properly stated, the responsibility might be CDC's. This is why CDC itself did not object to the form of verdict that was submitted to the jury (see Jury Verdict, Respondent's App. VI). The first 3 interrogatories of the verdict were couched in such a way (not objected to by CDC) as to permit the jury (if the jury deemed it appropriate) to decide that CDC was responsible and liable for paying the debt to USI. Thus, while the October 26, 1983 Agreement contained an acknowledgement of debt, with an excuse,the complaint and the trial led to a verdict *which showed no debt* because the jury found that CDC's misconduct made it responsible for this obligation, as MD had always contended. But if the jury had not made such a finding, then USI and MD would have continued their adversarial relationship. Even to this day, as this case continues to be fought, and unless and until USI collects from CDC, MD and CDC remain in an adversarial relationship.

judgment against MD so that it could, if necessary, collect on such judgment against the various properties owned by MD in addition to the Ciudad Cristiana property, such as the Manati lands.

MD stated on page 2 of the October 26, 1983 Agreement, in the third WHEREAS clause, that the failure by MD to pay USI the balance of the $1,585,000.00 indebtedness (amounting to $1,200,700.00), was "due exclusively to the non-performance by the Compañia de Desarrollo Cooperativo (CDC). . . . of the contractual obligations under the agreement . . . dated October 17, 1978. . .". Regardless of whether MD successfully proved CDC's liability, MD, nevertheless, acknowledged the debt to USI of $1,201,700.00, for which USI would need a judgment in order to be able to enforce its rights against the various properties of MD if MD were to refuse or be unable to pay such obligation to USI.

If anything, the October 26, 1983 Agreement is *not* a commitment by MD to pay USI the $1,201,700.00; rather it is only an acknowledgement of the debt. If MD had not proved its case against CDC, the difficulties in USI's collecting its judgment against MD would have been enormous; and if USI did not have a judgment but only had an acknowledgement of debt, then if MD refused or was unable to pay (despite the acknowledgement of debt) USI would still have had to go into court, sue on the acknowledgement of debt, and then obtain a judgment. Thus, under the *Fidelity and Deposit* case, USI, like Fidelity "really did want a judgment" (*Fidelity and Deposit* at 1267) against MD for the very practical reasons described hereinabove.

As the District Court Judge stated in his Order of June 29, 1987 (Respondent's App. II at page 32a):

> "The fact that MD had subscribed an agreement recognizing its debt did not render moot USI's interest in obtaining a judicial finding of MD's liability. E.g., *Martino v. McDonalds Systems, Inc.* 598 F.2d 1079 (7th Cir), Cert. denied, 444 U.S. 966 (1979) (consent judgment may be accompanied by judicial findings of fact and conclusions of law). The prohibition against collusive suits does not bar claims which arise out of conduct designed by the litigant to initiate litigation while minimizing possible adverse consequences where, in fact, the litigant retains an adversary interest. *The contract itself did not guarantee that MD was going to pay USI, the fact is that it was a collateral given, not a payment.* Between MD and USI, adverse interest was present from day one." (Emphasis supplied. Citations omitted.)

As the First Circuit pointed out in the Opinion below (Respondent's App. I at page 9a), the October 1983 Agreement did not create the court's jurisdiction, since jurisdiction existed without the Agreement and Assignment and, after the October 1983 Agreement and Assignment, as the Circuit Court stated, "There remained a real conflict of interest between the parties." Respondents App. I at page 7a. The holding of the First Circuit in this case is, therefore, in consonance with the applicable decisions of this Court and the other Circuits.

CONCLUSION

For the foregoing reasons, respondent M.D. Construction, Inc., respectfully requests this honorable court to deny the petition for writ of certiorari to the Court of Appeals for the First Circuit.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 24th day of April, 1989.

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APPENDIX

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APPENDIX I

Opinion of October 25, 1988 of the First Circuit Court of Appeals reported at 860 F.2d 1, (1st. Cir. 1988)

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 87-1721

U.S.I. PROPERTIES CORP.,
Plaintiff, Appellee,

v.

M.D. CONSTRUCTION COMPANY, INC., ET AL.,
Defendants, Appellees,

COMPANIA DE DESARROLLO COOPERATIVO,
Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO
[Hon. Jose Antonio Fuste, *U.S. District Judge*]

Before

Campbell, *Chief Judge,*
Torruella and Selya, *Circuit Judges.*

Marcos Ramirez Lavandero with whom *Dennis Simonpietri Monefeldt, Salvador Tio, Gretchen Coll Marti* and *Ramirez & Ramirez* were on brief for appellant.

Ruben T. Nigaglioni with whom *Maria Soledad Pineiro* and *Ledesma, Palou & Miranda* were on brief for appellee U.S.I. Properties Corp.

Harry E. Woods with whom *Geoffrey M. Woods, Gerardo Mariani* and *Woods & Woods* were on brief for appellee M.D. Construction Company, Inc.

OCTOBER 25, 1988

TORRUELLA, *Circuit Judge.* This appeal follows a five and a half week jury trial that resulted in a $12.5 million verdict for plaintiff USI Properties Corp. and for codefendant MD Construction Inc. Appellant, defendant Compañía de Desarrollo Cooperativo, raises a number of issues of very diverse nature and complexity. Having reviewed carefully the unnecessarily ponderous briefs and record, we affirm.

Background

The basic event underlying this complex case is the signing of multiparty agreements on October 17, 1978 ("1978 agreements"). The parties were USI Properties Corp. ("USI"), a Delaware corporation, Compañía de Desarrollo Cooperativo ("CDC") a public corporation of the Commonwealth of Puerto Rico, MD Construction, Inc. ("MD"), which is incorporated under the laws of Puerto Rico, April Industries Inc. ("April"), Government Development Bank for Puerto Rico, and the Royal Bank of Canada. April, a Delaware publicly owned corporation, is the sole owner of Futura Development Co. of Puerto Rico, itself the sole owner of MD.

The terms of the agreement were as follows: USI sold a parcel of land to MD where MD would construct a housing project called Ciudad Cristiana. The purchase price was $1,224, 230, with a downpayment of $5,000. USI retained a mortgage on the land payable at the completion of the project, which, with interest, was worth approximately $1.6

million. April entered into the agreement as guarantor of MD.

A second agreement on the same date bound MD and CDC as follows: MD would build 700 housing units on the land purchased from USI and CDC would sell the houses to individual buyers. The Royal Bank of Canada provided CDC a revolving line of credit of $4.5 million to provide the interim financing for the project. The Bank commitment was secured by a $5 million note from MD, and by a first mortgage on the land sold by USI. In order for the Bank to obtain a first mortgage on the land, USI agreed to subordinate its lien to the Bank's lien.

CDC agreed to notify USI of any breach committed by MD or any variations in performance by CDC. In early 1982, however, after completion and delivery of 480 units, CDC stopped financing the project, for reasons the parties still dispute. Once the flow of funds from CDC stopped, MD could not proceed with the project, and thus defaulted in its payment obligations to USI.

CDC sued MD in the Puerto Rico superior court in October 1983. Also in October, USI sued MD and CDC in federal court.

On October 26, 1983, one day before USI filed its complaint, USI, MD and April entered into an agreement ("1983 agreement") which included the following items:

1. MD conceded owing USI $1,585,000;
2. USI would sue MD and CDC in federal court;
3. USI would not execute against MD on the note or on any judgment until 30 months after the agreement;
4. MD and April assigned to USI any judgment or settlement resulting from federal or state actions or from any out of court settlement resulting from actions by or against CDC;

5. USI would sue April in the Superior Court of Puerto Rico only after 90 days from the date of the agreement;

6. MD and April would not raise defenses against USI nor assert any claim whatsoever against USI other than that the only party responsible for the failure of the project was CDC.

USI sued MD and CDC in federal court in October 1983. MD filed a crossclaim against CDC, which in turn filed a crossclaim against MD and a counterclaim against USI. Trial commenced on May 15, 1987 and lasted over five weeks. The jury returned a verdict in favor of USI, against CDC, for $1.2 million, and for MD on its crossclaim against CDC for $11.4 million.

One of CDC's main defenses was that the land used to develop the Ciudad Cristiana project was contaminated with mercury. Both the Secretary of the Department of Health and the head of the Environmental Quality Board testified about the reasons for their determination that the area had to be evacuated. Following this determination, the government had evacuated the area in 1985. The Ciudad Cristiana "scandal" resulted in extensive hearings in the Puerto Rico legislature.

The remaining facts will be provided as they become relevant to the issues on appeal.

Discussion

Appellant CDC raises a veritable barrage of issues. Given their diverse nature and complexity, we will discuss them sequentially as presented by CDC.

1. Jurisdiction: Realignment of Parties

CDC argues that USI and MD should be realigned as parties, based on the 1983 agreements, and relying on *Indianapolis* v. *Chase National Bank*, 314 U.S. 63 (1941). Such a finding would divest the federal courts of diversity

jurisdiction. The issue boils down to the import of the 1983 agreements on the controversy at hand. CDC argues that the dominating controversy in this case is who is liable for breach of contract with regard to the Ciudad Cristiana agreements. Therefore, since both USI and MD agree that CDC should be liable, USI and MD are on the same side of the controversy and should be realigned as plaintiffs. If USI and MD were both plaintiffs, then there would be Puerto Rico corporations on both sides of the case—MD as a plaintiff and CDC as defendant—thus defeating diversity jurisdiction.

Our task is to determine "the primary and controlling matter in dispute," *Indianapolis*, 314 U.S. at 72, and then determine whether any actual collision in interests remains. In other words, are USI and MD "partners in litigation"? *Id.* at 74. The reasons for such an argument are worthy. The 1983 agreement made USI and MD partners in litigation insofar they both alleged that CDC was the party ultimately responsible for the breach. Furthermore, MD agreed not to raise any defenses against USI.

Unfortunately for CDC, one key issue remained in controversy, namely, who would pay for the breach. Indeed, MD conceded its debt to USI, but that did not equate to payment at that time, since MD consistently has held that CDC is the party responsible for the failure of the whole project. MD assigned to USI all amounts to be recovered in the action against CDC, but even assignment of amounts recoverable did not abate MD's risk.

The district court found there was a genuine conflict between the parties at the time USI filed its complaint. The court found that the 1983 agreements "all boil down to the fact that MD would eventually transfer or assign to USI litigation proceeds in the amount of its debt from any judgment awarded MD against CDC." Opinion and Order, No. 83-2647, slip op. at 11 (D.P.R. June 29, 1987). The court further stated:

> The plaintiff and MD, although having common strategies against CDC, indeed had different interests. USI's interest is to, in its day, execute against MD and, eventually, annul CDC's first-ranking mortgage or to recover directly from [MD]. MD's interest is to recover its own damages and to pay USI. Realignment is not called for under these circumstances. *City of Dawson* v. *Columbia Ave. Saving Fund*, 197 U.S. 178 (1905); *Dolch* v. *United California Bank*, 702 F.2d 178 (9th Cir. 1983) (in an estate's context); *Hopkins Erecting Co.* v. *Brianwood Apartments*, 517 F. Supp. 243 (E.D. Ky. 1981) (in a removal context). Accordingly, we find that jurisdiction under 28 U.S.C. § 1332 lies.

Id. at 14.

We agree. Looking at the pleadings, and at the background of this action, we find that the court below correctly found diversity jurisdiction. This is a close case in an area where the applicable law is not especially enlightening. However, the court's findings are clearly supported by the record and reflect appropriate application of *Indianapolis* and progeny. MD's concession of liability meant the unavoidable realization that it would pay—yet to be determined, however, was the most crucial detail of whether payment would be out of its own funds or out of monies recovered from CDC. There remained a real conflict of interests between the parties.[1] *See* 3A J. Moore,

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[1] Another perhaps useful approach to this difficult problem, exemplified in *Fidelity & Deposit Co. of Maryland* v. *Sheboygan Falls*, 713 F.2d 1261, 1268 (7th Cir. 1983), is to speculate on a different scenario: if the party to be realigned had been left out of the lawsuit, would that party be indispensable under Fed. R. Civ. P. 19? And if so, on what side of the lawsuit? If the lawsuit had commenced with USI as plaintiff and CDC as the sole defendant, MD would undisputably have been found to be an indispensable party under both R. 19(a)(1) and

J. Lucas, G. Grotheer, *Moore's Federal Practice* ¶ 19.03, 19-52 (2d ed. 1987).

2. Jurisdiction: Collusion

CDC's next line of attack, again pegged to the 1983 agreements, is based on 28 U.S.C. § 1359, which states that "[a] district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court." Under this statute, courts must determine whether any party has been artificially brought into or left out of an action in order to invoke the jurisdiction of the federal court.

The district court, relying on *Kramer* v. *Caribbean Mills*, 394 U.S. 823 (1969), found that arguing collusion did not assist CDC much because it is not on account of the 1983 agreement that USI is a plaintiff in this case. This case stems from the multilateral agreements that would have led to the construction of the Ciudad Cristiana project. USI is not a party brought in only to manufacture diversity jurisdiction. Neither is MD placed as a defendant due to some contrivance. MD was liable to USI under a promissory note, and had a colorable (indeed, ultimately successful) claim against CDC.

(a)(2). *See Acton Co., Inc. of Massachusetts* v. *Bachman Foods, Inc.*, 668 F.2d 76, 78-79 (1st Cir. 1982). More difficult would be to place MD as plaintiff or defendant, since the 1983 agreement would seem to make MD a plaintiff as to CDC, whereas the debt on the note would certainly make it a defendant as to USI. However, in our exercise of "if history," MD would still be a defendant, since CDC would have had to bring MD into the lawsuit in the posture of a third party defendant, brought in as the party ultimately liable for USI's claim against CDC.

As to USI, MD remained a defendant even after the 1983 agreement, since MD still owed USI the debt the note certified. A judgment on this debt would be facilitated, not precluded, by MD's concession of its debt. Therefore, even under this approach MD would still be a defendant, and the federal court would still have subject matter jurisdiction.

CDC raises two more arguments sounding in collusion. April was not sued, even though it was a party to the 1978 agreements and even though it ultimately could face liability as a guarantor for MD. Indeed, April was a party to the 1983 agreement, and there was some evidence that obtaining federal jurisdiction was a consideration in leaving April out of the complaint. However, given April's role as guarantor to MD's note to USI, USI could choose to sue the note issuer, the guarantor, or both. Without any artificial shifting of roles, USI could sue only MD and CDC.

The remaining issue is the allegedly stealthy way in which the agreements were entered into and later "hidden" from CDC and the court. It is unclear how appellants learned of the 1983 agreements. According to appellants, they had to conduct some imaginative sleuthing to find the agreements. According to appellees, it was there for the asking, and were in fact provided upon request. Any delay was the result of the fact that the assignment agreements bore no relevance to the breach that caused the lawsuit.[2]

The court below correctly found that "the MD-USI assignment does not bestow on USI the rights under which it sits as plaintiff. With or without assignment, diversity jurisdiction among the parties exists." Opinion & Order No. 83-2647, slip op. at 9 (D.P.R. June 29, 1987). We note, furthermore, that parties may legitimately try to obtain the jurisdiction of federal courts, as long as they lawfully qualify under some of the grounds that allow access to

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[2] CDC proceeds to accuse opposing counsel of fraud upon the court, which counsel for USI and MD vehemently deny. It is not the role of this court to determine the veracity of statements by officers of the court, as all lawyers are. As far as we can tell, however, these allegations are without justification. It is, furthermore, highly unbecoming to allow allegations of fraud upon the court to appear as part of the substantive argumentation. Careful research and cogent reasoning, not aspersions, are the proper tools of our trade.

this forum of limited jurisdiction. On the other hand, using a strawman, or sham transactions, solely for the creation of otherwise unobtainable jurisdiction, is clearly forbidden both by statute and by the policies that underlie diversity jurisdiction.

3. Jurisdiction: USI's Principal Place of Business

CDC's next line of attack is to argue that diversity jurisdiction does not lie because USI's principal place of business is Puerto Rico. CDC does not challenge the court's application of the "principal place of business test." *See Topp* v. *Compair Inc.*, 814 F.2d 830, 834 (1st Cir. 1987). Instead, CDC focuses on the factual basis for the court's determination, namely, that the evidence produced by both parties supported the finding that Puerto Rico was USI's principal place of business. The court's determination that New York is USI's principal place of business is to be affirmed unless found to be clearly erroneous. *See Valedon Martinez* v. *Hospital Presbiteriano*, 806 F.2d 1128 (1st Cir. 1986).

The court reviewed evidence offered by CDC and concluded that policy decisions were made in New York, where the administrative offices were located, and that the last tax returns had been filed in New York. The record supports these findings, and thus we cannot find that the court's determination was clearly erroneous.

4. Jurisdiction: April as an Indispensable Party

The next arrow in CDC's quiver is based on arguing that April is an indispensable party, which would defeat diversity jurisdiction because USI and April are both citizens of Delaware.

April is the "grandparent" of MD; MD is the wholly owned subsidiary of Futura, itself a wholly owned subsidiary of April. April's role in the original agreements is that of a guarantor of the USI note, liable jointly and severally with MD.

This court set out the applicable guidelines for the treatment of indispensable parties in relation to diversity jurisdiction.

> Rule 19 of the Federal Rules of Civil Procedure provides for the joinder to a suit of parties needed for its just adjudication. The rule furthers several related policies, including the public interest in preventing multiple and repetitive litigation, the interest of the present parties in obtaining complete and effective relief in a single action, and the interest of absentees in avoiding the possible prejudicial effect of deciding the case without them. Rule 19(a) sets forth three types of parties to be joined if feasible; but if joinder will divest the court of subject matter jurisdiction, Rule 19(b) directs the court to "determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed."

Acton Co., Inc. of Mass. v. *Bachman Foods, Inc.*, 668 F.2d 76, 78 (1st Cir. 1982).

Without articulating any reasons for this finding, the district court concluded that April was not an indispensable party. Providing a bit more reasoning, we agree.

Under Puerto Rico law, when a guarantor is solidarily bound with a debtor, namely, jointly and severally liable, a plaintiff claiming on the debt can sue one, the other, or both. 31 P.R. Laws Ann. § 4871, *et seq.* (1968), *Colon* v. *P.R. & Am. Insurance Co.*, 63 P.R.R. 332, 340-41 (1944). By law, therefore, a guarantor is not an indispensable party under Puerto Rico law for purposes of Rule 19 because, as to these parties, complete relief was available without the need to bring in April. There is no danger of repetitive proceedings because if April's rights ever came into play they would only affect its relationship with MD,

the principal debtor, not affecting the merits of the USI-MD-CDC lawsuit.

We note that CDC's allegations ring hollow in light of the fact that in a parallel action in Puerto Rico courts, it chose to sue MD, without including the now allegedly indispensable party.

5. Jurisdiction: MD as an Alter Ego of April

In yet another attempt at challenging federal jurisdiction, CDC next raises the issue of MD's existence as a separate corporate entity. CDC would have us find that MD's citizenship is that of its grandparent corporation, Delaware, which would defeat diversity with USI. CDC correctly points out the legal standard: subsidiary and parent corporations are generally considered to be separate entities for diversity jurisdiction purposes. *Topp* v. *Compair, Inc.*, 814 F.2d 830, 835 (1st Cir. 1987). The court there also stated that even if the parent corporation exerts a high degree of control through ownership or otherwise, and even if the separateness is perhaps only formal, the subsidiary's place of business is controlling for diversity purposes if the corporate separation is real and carefully maintained. *Id.* at 836. This is a factual determination, which we can overturn only if we find it to be clearly erroneous.

CDC argues that MD is not only a wholly owned subsidiary of April, but also shares all officers and directors with its grandparent corporation. MD does not contest this proposition. CDC further argues that MD does not prepare its own budget, construction requirements, or policies and procedures and that it is grossly undercapitalized. MD asserts it existed as a separate entity for seventeen years, and had surpluses ranging from $600,000 to $1,000,000. MD further states that it has always kept separate records, books, and minute books. The reason we go through this ping-pong exercise is to gauge the district court's basis for its finding that the alter ego doctrine did not make

April the real party in this litigation. Clearly, the court had sufficient evidence for its conclusion.

6. Ultra Vires

Paradoxically, CDC argues that its signing the 1978 agreements was forbidden by Puerto Rico law. CDC is a public corporation created for the purpose of furthering "the swiftest expansion of the Puerto Rican cooperative movement." P.R. Laws Ann. tit. 5, § 981b (1982). On its face, the statute makes no statement as to the reach of CDC's legitimate activities. On the contrary, § 981e(a) states that "[t]he Company shall foster, by such means as it may deem most desirable, the development and expansion of cooperative enterprises by helping them promote, initiate, and maintain in operation *all kinds of economic activities*" (emphasis added). Ambiguity enters through another door. The Department of Housing, created by Law 97 of June 10, 1972, P.R. Laws Ann. tit. 3, § 441, *et seq.* (1982), is "responsible for making and executing the public policy on housing and communal development of the Commonwealth of Puerto Rico, and of administering all the governmental programs in this field." *Id.* § 441b. From this language, appellants infer that the Department of Housing has *exclusive* authority for the construction of any kind of housing projects by the Commonwealth government.

Facially, this argument does not carry much weight. Section 441b(e) states, as one of the functions of the Housing Department:

> (e) To develop the construction of housing projects for cooperatives organized by government organizations responsible for this function. It being understood, further, that the Department of Housing shall coordinate and refer to the agencies of the Cooperative Development Administration and the Cooperative Development Company of Puerto Rico the groups interested in the or-

> ganization of housing cooperatives to be guided as to everything related with the organization and operation of this kind of cooperative. Provided, that said agencies shall retain the functions of promotion, development, education, organization and qualification of members of housing cooperatives.

The specific reference to CDC and its possible interplay with the Department of Housing casts appellant's argument in a very dim light. But from this statutory basis, we must go back to the factual history of the case to determine whether the ultra vires argument obtains.

CDC had approval from its own counsel and from its finance committee to enter into the 1978 agreements. The Government Development Bank, fiscal agent for CDC (and for the Commonwealth government in its entirety, *see* P.R. Laws Ann. tit. 7, § 581 (1982)), approved CDC's role in the project. Appellees contend, and CDC does not challenge, that the Department of Housing supervised CDC's participation in this enterprise. Furthermore, the Puerto Rico Housing Bank, a public corporation "attached" to the Department of Housing (*see* P.R. Laws Ann. tit. 3, § 441e (1982)), actively participated in the 1978 agreement in the role of guarantor to the mortgages for the project.

From this perspective, it may seem amazing that an ultra vires argument should arise at all. However, the Department of Justice issued an opinion early in 1982 to the effect that CDC had no stated or constructive powers to develop cooperative housing projects. *See* 1982 Op. Sec. Jus. No. 8. This position was confirmed by the Comptroller General of Puerto Rico.

We note first that the opinions of the Secretary of Justice of Puerto Rico are not binding upon the courts. *Meléndez Ortiz* v. *Valldejuli,* 87 J.T.S. 112, n.7 (1987). Further, under Puerto Rico law, great deference is due to an agency's construction of its powers pursuant to its

organic act, *Hernández Denton* v. *Quiñones Desdier*, 102 D.P.R. 220 (1974). We find, based on the statutory language and on the housing agencies' reading of the statute (as expressed also by the participation of the Department of Housing and the Housing Bank), that the court did not err in finding that CDC did not act beyond its statutory powers in entering into the 1978 agreements.

7. Improper Statements by MD Counsel

CDC seeks reversal based on several statements made by MD's counsel during closing argument, regarding the veracity of CDC's witnesses. MD counsel used the words "corrupt," "conspirators," "lies," "prevarications" and others to refer to the testimony of CDC's witnesses. CDC did not object at the time.

Our task is to review the court's decision to allow the statements under the "plain error" standard. *Emery-Waterhouse Co.* v. *Rhode Island Hosp. Trust Nat'l Bank*, 757 F.2d 399, 410 (1st Cir. 1985). In the context of civil cases, we have stated that judges have "considerable discretion." *Id.*

We find the language in *Service Auto Supply Co. of P.R.* v. *Harte & Co.*, 533 F.2d 23 (1st Cir. 1976) especially applicable to this case:

> Appellant sees fit to challenge the closing argument of appellee's counsel. It does indeed appear, in cold print, somewhat Gothic and extreme. But there was no call on the court to halt the excess of verbal imagery or invocation to the poets. We cannot fault the court. And perhaps opposing counsel felt that the effort would trip on its own ebullience. This kind of play must normally be left to counsel and the trial court, at least in a civil case.

Id. at 28. While we do not take kindly to statements of counsel's opinions, *see Polansky* v. *CNA Insurance Com-*

pany, No. 87-2086, slip op. at 4 (1st Cir. July 25, 1988), in a civil case and absent timely objection, "we cannot fault the court."

8. Discovery

CDC and MD struggled strenuously to get more time for discovery, which the court steadfastly resisted (although the trial was postponed for 45 days to allow termination of discovery). Now that each party has its lot, CDC finds offense in the court's direction (whereas MD now apparently sees the wisdom of the court's rulings).

The basic allegation is that the district court considered more important the "public interest" of not having a case lie on its docket for a long time, over the actual interests of the litigants. *See Alamance Industries, Inc.* v. *Filene's,* 291 F.2d 142, 147 (1st Cir. 1961).

We have reviewed the voluminous files of this case and find that the district judge grabbed control of a complex and controversial litigation effectively, and stringently, in the face of a deluge of papers. We note that the issues deemed insufficiently addressed—mercury contamination and the arguably political background of the case—were addressed at trial and that the main characters in the decision-making process of all parties were deposed and/or examined and cross-examined at trial. There is no indication of abuse of discretion.

9. Rule 37 motions

Shortly before and even during trial, CDC filed Motions under Fed. R. Civ. P. 37 requesting dismissal of appellees' claims arguing that it was unprepared to go to trial because of failure to disclose on their part. Appellant's argument raises no compelling issues. We have reviewed the record and find no abuse of discretion.

10. Polling the jury

On June 18, 1987, while the trial was in progress, a major newspaper published an article with the headline

"Contractors Exonerated," and a smaller headline read "The Commonwealth Loses the Ciudad Cristiana Case." The court alerted counsel of the article and, after hearing argument, decided not to poll the jury about whether they had seen the headlines or article. The court stated:

> THE COURT: Remember, Mr. Simonpietri [CDC counsel], that none of the issues that are published in the story which relates to the voluntary dismissal of complaints, basically[,] [a]nd the potential economic impact this may have on the Government, as a result of the voluntary dismissal and other expenditures that the newspaper claims have been related to this case, is not going to be before them for decision anyway. That is not part of what they are going to decide. And I don't think I should poll the Jury under those circumstances.
>
> What I will do is, I will instruct them accordingly as I have done in the past in a more expanded fashion, about what is it they can do or cannot do from the standpoint of newspapers. As I said before, we should not presume that Jurors are here violating their duties and their sworn obligations. We should presume that the possibility always exists that they are confronted with the material. But we must presume, that as good citizens, as I am sure they all are, they are going to respect the Court's instructions on that issue.

Throughout the trial, the Court repeatedly instructed the jury to avoid media exposure. The court's balanced approach is both appropriate and desirable in the context of a civil case, considering the possibility of prejudice, the contents of the article, and the costs to litigants and to the courts.

11. New Trial

CDC requests a new trial on three grounds, only two of which deserve discussion.

A. Sufficiency of the Evidence

We have stated repeatedly the standard to overturn a trial court's decision not to grant a new trial: the appellant "must show that the verdict was 'so clearly against the weight of the evidence as to constitute a manifest miscarriage of justice.' " *Jordan* v. *United States Lines, Inc.*, 738 F.2d 48, 49 (1st Cir. 1984) and cases cited therein.

We have reviewed the record, and find that this case is not even a close one. CDC is attempting to convince us of an *interpretation* of documents presented in evidence based on correspondence prior to the 1978 agreements and communications after the agreements, to find that MD had a responsibility to obtain financing for the project. CDC even qualifies its conclusion by stating that "the jury's verdict is clearly unsupported by the evidence, *or at least clearly against the great weight of the evidence.*" We refuse to accept the invitation to engage in fact finding; it is now late to retry the case.

B. Parol evidence

Under Puerto Rico law, if the words of a contract appear contrary to the evident intention of the contracting parties, the acts of the parties, both contemporaneous with and subsequent to the contract, are evidence relevant to the contract's interpretation. P.R. Laws Ann. tit. 31, §§ 3471 and 3472. *See Marina Industrial, Inc.* v. *Brown Boveri Corp.*, 114 D.P.R. 64 (1983) (the strict mandate of § 3471 requires the court to abide by the literal meaning of the terms of the contract when they leave no doubt as to the intention of the contracting parties).

The court did not allow the introduction for the purpose of clarifying the contract of two letters issued prior to the

1978 agreements from which CDC would have argued that MD was the party responsible for obtaining financing for the project. The documents were admitted for other purposes. The crucial language, pointed out by CDC, is as follows:

> [April] will develop the project and sell the houses to [CDC] who in turn will sell the houses to individual persons. The number of houses April will sell to CDC each year will be equal to the permanent mortgage financing to be provided by the Farmers Home Administration. Presently such financing has been set at 200 housing units per year."

August 14, 1978 letter from April's president to CDC's president.

This letter is not illuminating as to the intent of the parties regarding who was responsible for obtaining financing. Furthermore, USI contends that the "real" intent of the parties forms no part of the pleadings. There was, however, a conflict between the purchase and sale agreement and the loan agreement, as to who would obtain permanent commitments. For that purpose, both MD and CDC examined and cross-examined the principal officers of both entities. The import of the absence of the letters in the face of extensive testimony by the actual actors can only be described as minimal.

C. District Court Comments

CDC argues that several comments by the trial judge influenced the jury to such extent that a miscarriage of justice can be avoided only by ordering a new trial. Citing no authority in support of its requested remedy, CDC finds the harm to be self-evident. We have reviewed the transcript and we see no prejudice in any of the comments cited in appellant's brief. We therefore give this matter no further consideration.

12. Remaining claims

The remaining claims, attacking the jury findings regarding lack of reputation, damage computation, and sufficiency of the evidence relating to damages, lack merit.

For the reasons stated in this opinion, the judgments below are *affirmed.*

APPENDIX II

Opinion and Order of June 29, 1987 of the Federal District Court for the District of Puerto Rico

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Civil No. 83-2647 (JAF)
(Not for Publication)

U.S.I. PROPERTIES CORP.,

Plaintiff,

v.

M.D. CONSTRUCTION, INC. and
CORPORACION DE DESARROLLO
COOPERATIVO,

Defendants.

OPINION AND ORDER

Codefendant Compañía de Desarrollo Cooperativo (CDC) moved once again for the dismissal of this case alleging lack of diversity jurisdiction. The latest motion[1] was filed on May 12, 1987, three days before commencement of trial. A hearing was held on May 14, 1987. We held in abeyance the motion to dismiss and informed the parties that we would closely monitor plaintiff's burden of establishing jurisdiction at trial. A ruling would be made at the conclusion of the presentation of evidence, to be followed by a written opinion and order. As stated, prior to this last objection to the court's jurisdiction, CDC had questioned plaintiff U.S.I. Properties Corp. (USI)'s claim of diversity

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[1] The motion is entitled "Motion for Realignment of Parties and to Dismiss for Lack of Diversity Jurisdiction, pursuant to 28 U.S.C. sec. 1359 and for Presenting a Non-Existent Case or Controversy." A second matter raised is that M.D. Construction, Inc. (MD) is the alter-ego of an MD-related corporation, April Industries, Inc. (April), and that the corporate veil must be pierced, thus causing April to be the real party in interest. No evidence to this effect was presented by CDC.

of citizenship under 28 U.S.C. sec. 1332(c). The previous motion resulted in an order to show cause against plaintiff USI requesting it to bring forward evidence sustaining its allegation of having its principal place of business in New York. After voluminous filings of affidavits and memorandums of law, we entered an order on March 20, 1987, finding that

> USI Properties has established *prima facie* that diversity jurisdiction exists. Be it remembered that jurisdiction in a case before a Federal court is a matter that must be alleged and proved. Therefore, this ruling does not bar the parties from presenting evidence for and against it at trial.

See Opinion and Order, docket document No. 173.

Plaintiff, as of March 20, 1987, satisfied its burden of establishing *prima facie* that jurisdiction lies. Therefore, we allowed the case to go to trial, reserving our final ruling to have the benefit of evidence. *Accord, Loria & Weinhaus, Inc. v. H.R. Kaminsky & Sons, Inc.*, 80 F.R.D. 494 (D.N.Y. 1978); *Wells Fargo & Co. v. Wells Fargo Exp. Co.*, 556 F.2d 406 (9th Cir. 1977); *Hyle v. Continental Capital Corp.*, 575 F.Supp. 616 (D.Pa. 1983); *Central Inv. Corp. v. Mutual Leasing Associates, Inc.*, 523 F.Supp. 74 (D. Ohio 1981).

As the trial progressed, on June 11-12, 1987, we allowed CDC to call as its witness USI's vice-president Donald Alberty. Even though Alberty had been cross-examined on matters related to jurisdiction when he first testified as part of plaintiff's case, we afforded CDC a full rehearing on the matter. At such hearing,[2] counsel for CDC failed

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[2] We are at a loss regarding counsel for CDC's insistence towards letting the jury decide the question of jurisdiction. We cannot consider counsel to be ignorant of federal jurisdiction law. As a matter of fact, on the hearing held on May 14, 1987, counsel for CDC, Salvador Tió,

to prove facts supportive of their 28 U.S.C. sec. 1359 collusion allegation or as to their realignment petition. The matter remained submitted. At the conclusion of all evidence, we made a finding of jurisdiction. This opinion and order explains the ruling.

I.

It is hornbook law that 28 U.S.C. sec. 1332(c) requires complete diversity among the opposing parties to a suit. *Strawbridge v. Curtiss*, 7 U.S. 267 (3 Cranch) (1806). If a corporation is involved as a party, it is deemed a citizen of the state it is incorporated in and of the state where it has its principal place of business. *District of Columbia ex rel American Combustion, Inc. v. Transamerica Ins. Co.*, 797 F.2d 1041, 1043 (D.C. Cir. 1986).

The evidence demonstrates that in 1983 USI Properties, as a subsidiary of USI Industries, had business dealings regarding land holdings in Puerto Rico. CDC tried to prove that these Puerto Rico land holdings constituted the majority of USI Properties' real property inventory. CDC submitted into evidence the summary of operations for the year 1983 and various memorandum letters from which the following facts are proved: (a) the policy decision-making of the company transactions occurred in New York; (b) USI Properties was engaged in the business of selling land held throughout the United States, Puerto Rico, and

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insisted on the well-settled law that it was for the court to decide such matter. *E.g., Valedón Martínez v. Hospital Presbiteriano de la Comunidad, Inc.*, 806 F.2d 1128 (1st Cir. 1986) (court duty while inquiring over its subject matter jurisdiction is to afford the nonmoving party ample opportunity to secure and present evidence. An evidentiary hearing is discretionary). *Accord., Prakash v. American University*, 727 F.2d 1174 (D.C. Cir. 1984). Also, the issue of lack of jurisdiction must be decided by way of dismissal. Fed. R. Civ. P. 12(h) (3); *Hawes v. Club Ecuestre El Comandante*, 598 F.2d 698 (1st Cir. 1979) (trial court may hear and determine issues of fact as to jurisdiction by receiving oral testimony and other evidence without holding a hearing).

Canada; (c) for the year 1983, USI Properties' land holdings in Puerto Rico did not constitute the majority of its real estate inventory; (d) Durret Wilson, president of USI Properties, residing in New York, was in charge of monitoring vice-president Alberty in Puerto Rico. The fact is that where the policy decisions were made, where the administrative departments were located, and where the last income tax return had been filed was in New York. *See Topp v. Compair Incorporated, Compair Ltd., Siebe PLC and Stephens,* 814 F.2d 830 (1st Cir. 1987). Plaintiff's burden of proving its principal place of business has been satisfied. USI is a Delaware corporation. Its principal place of business was not Puerto Rico. 1 *Moore's Federal Practice* para. 0.77 [3-21] (2d ed. 1986). We now examine the facts of the case to pass upon the 28 U.S.C. sec. 1359 argument regarding jurisdiction by collusion. The facts relating to a possible realignment of parties will be examined.

II.

The broad controversy presented here is one for collection of monies and damages filed by U.S.I. Properties Corp. (USI) for alleged breach of contract by defendants M.D. Construction (MD) and by CDC. The obligations assumed among the parties stem from certain written agreements entered into on October 17, 1978 and verbal representations. The parties to the contract were USI, MD, CDC, and Royal Bank of Canada (Royal Bank). A second set of contracts were entered into between CDC and MD. The parties here are a landowner (USI), a contractor/developer (MD), and the financial entrepreneur or purchaser (CDC).[3] The simple facts are that USI owned a

[3] CDC was to obtain a loan from Royal Bank for an amount of not more than $4,500,000, and a note would be issued by MD in the amount of $5 Million to be delivered in pledge to CDC, which would then pledge to Royal Bank as a security for the payment to Royal Bank of the loan for the interim financing. This note was to be secured by a first mortgage on the parcel sold by USI to MD.

tract of land in a site located in Humacao, Puerto Rico. This land was segregated and sold to MD with a mortgage in favor of USI, constituted by Deed No. 6, subscribed before notary Federico Ramírez-Ros on October 17, 1978. USI obtained in guarantee for its outstanding purchase price a first-ranking mortgage over the property sold. Subsequently, it subordinated its secured credit to allow CDC's fountain of money, the Royal Bank, to obtain the first mortgage. USI's $1,585,000 mortgage was subordinated to a $5 Million mortgage. USI agreed to this relying on the representations made by CDC, Exh. 1 at 27; Joint Exh. 7.

At some point in time, CDC did not follow through—for whatever reasons—with its contractual obligation of purchasing the house units being built by MD. This cut off the fund flow and caused MD to default its payment obligations with USI. Thereafter, a collision of interests among all the parties ensued.

At this moment, MD was sued in the local courts by CDC.[4] At the same time, USI was extrajudicially demanding payment from MD under the promissory note. The note became due on October 16, 1983.

Confronted with these financial pressures, MD and USI entered into negotiations. USI was confronted with the fact of a second-ranking mortgage subordinated in favor of a $5 Million debt, also MD's economic situation raised serious apprehensions on USI of a possible filing in bankruptcy.[5] USI and MD agreed[6] to the following: USI would

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[4] The local judicial action has been dormant since 1983. No action of importance ever took place.

[5] Stated at hearing of May 17, 1987.

[6] The agreement was subscribed on October 26, 1983, in a private document sworn before a notary public. Notarized documents are meant to be used publicly if need be. It is illogical to read from the mere execution of such notarized document the intent to collude.

file a complaint in the federal court against MD and CDC. MD would confess owing the moneys. USI would not execute such judgment against MD and hold the same in abeyance until the earlier to occur of the conclusion of said litigation by judgment, settlement or otherwise or thirty months from the date of the agreement.

In exchange for USI's agreement providing MD with financial breathing space by not executing, MD assigned USI any judgment or settlement MD and/or April may obtain in any forum and/or in the CDC or federal litigations and/or under the Ciudad Cristiana agreement (the MD/April judgment or settlement), in an amount sufficient to cover the indebtedness to USI Properties. In addition, it was agreed that the assignment of the MD/April judgment or settlement to USI Properties would be in the nature of additional collateral and not in substitution, limitation or in any way affecting the rights of USI Properties under the note, the mortgage, the guaranty and/or any rights USI Properties may have under the Ciudad Cristiana Agreement and/or arising out of or in connection with or related to the agreements and/or transactions contemplated by the parties under the Ciudad Cristiana Agreement. *See* docket document No. 234, Exh. 2.

Concurrently with the signing of the agreement, MD and April Industries, MD's guarantor, executed an assignment, whereby it assigned to USI Properties:

> [a]ll amounts recovered under the said action for monies due or to become due from CDC or any other third party liable to assignor pursuant to the Ciudad Cristiana Agreement but only to the extent of the indebtedness of assignor unto assignee as stated hereinabove, and that the *receipt* by said assignee of any payment *of such money shall be a discharge and acquittance of assignor to the extent of such payment.*

Docket document No. 234, Exh. 3 (emphasis added).

After approximately four years of litigation, codefendant CDC found these documents among USI's production of documents. Based on the language of the agreement and assignment, CDC alleges that it has proved (a) collusion among the parties to manufacture federal jurisdiction, and/or (b) that any controversy that existed between USI and MD has been rendered moot, requiring the realignment of MD as a party plaintiff. We now undertake the analysis of the merits of these legal arguments.

III.

The court's duty is to examine all facts and circumstances surrounding the execution of this type of agreement. *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941). The wording utilized in the agreement is not decisive as to the issue of manufactured jurisdiction proscribed by 28 U.S.C. sec. 1359. *Kramer v. Caribbean Mills*, 394 U.S. 823 (1969) (assignment of contract cannot federalize ordinary contract suits); *McSparran v. Weist*, 402 F.2d 867 (3rd Cir. 1968), *cert. denied*, 395 U.S. 903 (1969).

CDC alleges[7] that the only possible reason for USI, April and MD failing to disclose before this court the agreements entered into as part of the pleadings was a perception that their disclosure would defeat the diversity jurisdiction they had artificially attempted to manufacture. Docket document No. 234, at 5. The jurisdiction of the federal courts is limited not only by the provisions of Article III of the Constitution, but also by Acts of Congress. *Owen Equip. & Erection Co. v. Kroeger*, 437 U.S. 365, 378 (1978). The legislative acts herein are 28 U.S.C. secs. 1332 and 1359. The manipulative manufacturing of diversity jurisdiction

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[7] Also in issue is whether M.D. Construction is an alter ego of April Industries, which they allege to be an indispensable party. We do find that MD is not an alter ego of April. April is not an indispensable party.

created by adding a sham or straw party as part of a judicial action is forbidden under 28 U.S.C. sec. 1359.[8] J. Moore, *Federal Practice and Procedure,* sec. 1444 at 231-32. CDC, however, ignores the fact that the MD-USI assignment does not bestow on USI the rights under which it sits as plaintiff. With or without the assignment, diversity jurisdiction among the parties exists.[9] The real issue is whether the effect of the agreement between MD and USI placed them in such alliance of interest as to call for a realignment of MD and USI as plaintiffs, thus destroying the diversity requirement. *See Caribbean Mills, Inc. v. Kramer,* 392 F.2d 387 (5th Cir. 1968), *aff'd* 394 U.S. 823 (1969) (if an assignment does not divest the assignors of their interest in the lawsuit, the courts must consider the citizenship of the assignor).

IV.

Courts should prevent a simulation of federal jurisdiction. *See Owen Equip. & Erection Co.,* 437 U.S. at 376; *United States v. ITT,* 420 U.S. 223, 95 S.Ct. 926 (1975); *O'Brien v. AVCO Corp.,* 425 F.2d 1030 (2d Cir. 1969); *Bertino v. Polish Ocean Line,* 402 F.2d 863, (2d Cir. 1968). To determine the effect of matters relating to assignability, state law will control in an action based on diversity of citizenship. C. Wright, E. Miller & A. Cooper, *Federal Practice and Procedure* secs. 1544, 1556 at 647, 713 (the status of the party is normally treated as a question for the law of the forum state).

The effect of the agreement subscribed on October 26, 1983 was to reiterate the fact of MD's liability toward

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[8] Section 1359 states: "A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court."

[9] USI, plaintiff, a New York principal-place-of-business corporation, incorporated in Delaware; MD, a Puerto Rico-based and incorporated corporation, and CDC, a Puerto Rico corporation.

USI. The other contract subscribed, i.e., the assignment, would fall within the civil law figure of methods of satisfying a debt/obligation typified in Puerto Rico's Civil Code article 1129, 31 L.P.R.A. sec. 3179, subject to a "condition subsequent." *See* art. 1066, Civil Code, 31 L.P.R.A. sec. 3041. In this type of contract, the rights of the assignor will not accrue until the event therein depicted, i.e., obtention of judgment or settlement, occurs. Article 1067, Civil Code, 31 L.P.R.A. sec. 3042 (In conditional obligations, the acquisition of rights, as well as the extension or loss of those acquired, shall depend upon the event constituting the condition). *See Meléndez v. Jiménez Realty, Inc.*, 98 D.P.R. 892 (1970); *Martin v. Vector Company, Inc.*, 498 F.2d 16 (1st Cir. 1974). In the event MD obtained a judgment against CDC, as it did, the assignment entered into would acquire juridical life, being USI capable of demanding payment directly from CDC. The assignment did *not* have the effect of passing to USI the right to litigate the credit MD had against CDC. The agreements are clear and unambiguous. They all boil down to the fact that MD would eventually transfer or assign to USI litigation proceeds in the amount of its debt from any judgment awarded MD against CDC.

Under these facts we must now determine whether a rearrangement of the parties was required. In the landmark case of *City of Indianapolis v. Chase Nat. Bank*, 314 U.S. 63 (1941), the rationale which justifies realignment was expressed as follows:

> To sustain diversity jurisdiction there must exist an "actual" [citations omitted] controversy between citizens of different states, all of whom on one side of the controversy are citizens of different states from all parties on the other hand.

Here also, our duty is to "look beyond the pleadings, and arrange the parties according to their order in their sides in the dispute." *Dawson v. Columbia Ave. Sav. Fund Safe*

Deposit, 197 U.S. 178 (1905). The determination of the place a party truly occupies in a suit depends on the "collision of interest" which exists. *City of Indianapolis v. Chase Nat. Bank,* 314 U.S. at 69. Before aligning a party, the courts must make certain that the real and substantial interest in controversy is determined (i.e., dominant issue test). *Hudson v. Newell,* 172 F.2d 848 (5th Cir. 1949). It is often difficult to determine on which side of a controversy the interests of a party really lie; but that determination must be made from the actualities of the litigation. *Alexander v. Washington,* 274 F.2d 349 (5th Cir. 1960); *Commercial Comp. Serv. v. Data Point Corp.,* 641 F.Supp. 1579, 1581 (M.D. La. 1986) (realigning corporations when plaintiff controls or owns codefendant corporation). The facts forming the basis for realignment must have existed at the time of the commencement of the action. 3a J. Moore, *Federal Practice* para. 19.56.

The application of the "dominant issue" test of *City of Indianapolis* allows us to conclude that in the captioned case litigation ensued because MD was not able to develop and sell 700 houses to CDC. This gave rise to MD's default toward USI, which, because of CDC's representations, subordinated its mortgage. Here, in defining the boundaries of diversity jurisdiction, the court must be mindful of the congressional policies behind diversity jurisdiction. One of these is to afford an out-of-state plaintiff an impartial forum separated from the potential parochial tendencies local courts could have in favor of a local government-related defendant. The record of this case will reveal that this case is a typical example of litigation where reasonable men would agree that federal court would serve the purpose behind diversity jurisdiction. *Strawbridge v. Curtiss,* 7 U.S. 267 (3 Cranch) (1806); 14 C. Wright, E. Miller & A. Cooper, *Federal Practice and Procedure* sec. 3472. *See* L. Tribe, *American Constitutional Law* at 69 (1978).

Relevant to our case is whether MD, by assigning to USI the proceeds of an eventual judgment against CDC,

placed USI/MD on the same side of the fence. This did not occur. The complaint filed by USI pleaded a genuine adverse controversy between the parties. The fact that MD had subscribed an agreement recognizing its debt did not render moot USI's interest in obtaining a judicial finding of MD's liability. *E.g., Martino v. McDonalds System, Inc.*, 598 F.2d 1079 (7th Cir.), *cert. denied*, 444 U.S. 966 (1979) (consent judgment may be accompanied by judicial findings of fact and conclusions of law). The prohibition against collusive suits does not bar claims which arise out of conduct designed by the litigant to initiate litigation while minimizing possible adverse consequences where, in fact, the litigant retains an adversary interest. The contract itself did not guarantee that MD was going to pay USI, the fact is that it was a collateral given, not a payment. Between MD and USI, adverse interest was present from day one. *See Fidelity & Deposit Co. of Maryland v. City of Sheboygan Falls*, 713 F.2d 1261 (7th Cir. 1983); *American Motorist Ins. Co. v. Trane Co.*, 657 F.2d 146 (7th Cir. 1981); *Taxas Pacific Coal & Oil Co. v. Mayfield*, 152 F.2d 956 (5th Cir. 1946). "Parties will NOT be realigned if there are any substantial issues as to which the plaintiff needs relief against them." J. Moore, *supra*, para. 19.03, at 19-57 (1986). Mere mutuality of interest does not justify realignment. *American Motorist Ins. Co. v. Trane Co.*, 657 F.2d 146, 149 (7th Cir. 1981).

The plaintiff and MD, although having common strategies against CDC, indeed had different interests. USI's interest is to, in its day, execute against MD and, eventually, annul CDC's first-ranking mortgage or to recover directly from USI. MD's interest is to recover its own damages and to pay USI. Realignment is not called for under these circumstances. *City of Dawson v. Columbia Ave. Saving Fund*, 197 U.S. 178 (1905); *Dolch v. United California Bank*, 702 F.2d 178 (9th Cir. 1983) (in an estate's context); *Hopkins Erecting Co. v. Brianwood Apartments*, 517 F.Supp. 243 (E.D. Ky. 1981) (in a removal

context). Accordingly, we find that jurisdiction under 28 U.S.C. sec. 1332 lies.

IT IS SO ORDERED.

San Juan, Puerto Rico, this 29th day of June, 1987.

/s/ Jose Antonio Fuste

JOSE ANTONIO FUSTE
U. S. District Judge

APPENDIX III

Agreement of October 1983 signed by USI Properties Corp., M.D. Construction Company, Inc. and April Industries, Inc.

AGREEMENT

This Agreement made and entered into by and between USI Properties Corp (USIPROP), a corporation organized and existing under the laws of the State of Delaware duly registered and authorized to do business in the Commonwealth of Puerto Rico, herein represented by its Vice President-Operations, Donald L. Alberty, of legal age, married, executive and a resident of San Juan, Puerto Rico and M.D. Construction Company, Inc. (MD) a corporation organized and existing under the laws of the Commonwealth of Puerto Rico and April Industries, Inc. (April) a corporation organized and existing under the laws of Delaware and duly authorized to do business in the Commonwealth of Puerto Rico, both corporations represented by their President, Morris Demel, of legal age, married, executive and a resident of San Juan, Puerto Rico.

WITNESSETH

WHEREAS, MD and April issued and delivered to USIPROP a promissory note to the order of USIPROP in the principal amount of ONE MILLION FIVE HUNDRED AND EIGHTY FIVE THOUSAND DOLLARS ($1,585,000.00) (the Note) guaranteed and secured by a mortgage constituted by Deed No. 6 before Notary Public Federico Ramires Ros (the Mortgage), both instruments dated October 17th, 1978, the Note payable on or before October 16, 1983, and

WHEREAS in connection with the aforereferenced payment obligation of MD to USIPROP (the Indebtedness), April issued a guarantee in favor of USIPROP dated October 17, 1978 (the Guaranty), and

WHEREAS, MD and April have not complied with their joint and several obligation to pay the Indebtedness to USIPROP evidenced by the Note and secured by the Mortgage and the Guaranty, and

WHEREAS, M.D. and April have warranted and represented to USIPROP that the non-payment by MD of the Indebtedness as evidenced by the Note is due exclusively to the nonperformance by the Compañia de Desarrollo Cooperativo (CDC) and third parties other than USICORP, of the contractual obligations under the agreement between CDC, MD, April, the Royal Bank of Canada (Royal) and USIPROP dated October 17, 1978, and all Exhibits attached thereto of even date, pertaining to the development of the project known as Ciudad Cristiana located in the Muncipality of Humacao, Commonwealth of Puerto Rico (collectively the Ciudad Cristians Agreement) specifically and including the obligations of CDC under the Exhibits identified as the Loan Agreement and Purchase and Sale Agreement between CDC and MD of even date thereof, and

WHEREAS, MD and April have further warranted and represented to USIPROP that the Complaint filed by CDC dated October 14, 1983 against MD in the Superior Court of Puerto Rico, San Juan Section, Civil No. 83-5384 (805) on Breach of Contract, Collection of Note and Damages (the CDC Litigation) does not have any factual or legal basis and is without any merit whatsoever, and

WHEREAS on the basis of the aforereferenced warranties and representations of MD and April and other good and valuable consideration as hereinafter set forth USIPROP is willing to agree to certain conditions pertaining to the exercise of its rights under the Note, the Mortgage and the Guaranty, and generally under the Ciudad Cristians Agreement.

NOW THEREFORE, the Parties hereto agree as follow:

1. USIPROP herein agrees:

a) to commence legal action in the Federal Court against MD and CDC only and further not execute such Judgment as is rendered against MD and hold the same

in abeyance until the earlier to occur of the conclusion of the said litigation (the Federal Litigation) by judgment, settlement or otherwise or thirty (30) months from the date of this Agreement.

b) Postpone for ninety (90) days from the date hereof the commencement of any action it may take against April under the Note, the Mortgage and the Guaranty in the Superior Court of Puerto Rico (the April Litigation) and further, after commencement of such action, to hold in abeyance any judgment obtained in the said proceedings and not to execute the same until the earlier to occur of the conclusion of the CDC or Federal Litigation by judgment, settlement or otherwise or thirty (30) months from the date of execution of this Agreement.

2. MD and April shall:

a) assign in favor of USIPROP any judgment or settlement MD and/or April may obtain in any forum and/or in the CDC or Federal Litigations and/or under the Ciudad Cristiana Agreement, (the MD/April Judgment or Settlement), in an amount sufficient to cover the Indebtedness to USIPROP including USIPROP legal costs and expenses in connection with the proceedings to be commenced by USIPROP against among other, MD, April and CDC up to the sum of Sixty Thousand Dollars ($60,000.00), plus interest on the said Indebtedness at the rate of six percent (6%) per annum from the due date of the Note and until paid in full. Should MD and/or April obtain a Judgment or negotiate a Settlement against CDC and/or any third party under the Ciudad Cristiana Agreement in an amount in excess of Two Million One Hundred Thousand Dollars ($2,100,000.00), plus USIPROP legal fees and expenses, plus the basic rate of interest of six percent (6%), then in such event, the interest rate to be paid to USIPROP from the due date of the Note and until the Indebtedness is paid in full shall then be the prevailing prima rate set by Citibank, N.A., New York, for the period in question.

The Assignment of the MD/April Judgment or Settlement to USIPROP shall be in the nature of additional collateral and not in substitution, limitation or in any way affecting the rights of USIPROP under the Note, the Mortgage, the Guaranty and/or any rights USIPROP may have under the Ciudad Cristiana Agreement and/or arising out of or in connection with or related to the agreements and or transactions contemplated by the Parties under the Ciudad Cristiana Agreement.

b) not to file, against USIPROP, directly and/or through any third party, at any time, in any forum, any claim, counterclaim or cross claim on the cause of action to be asserted in the April, CDC or Federal Litigations and/or under the Ciudad Cristiana Agreement and/or arising out of or in connection with or related to the agreements and/or transactions contemplated by the Parties under the Ciudad Cristiana Agreement.

c) waive any and all rights they may have as a result of USIPROP inaction in filing or prosecuting in earnest its claim against April and/or MD.

3. This Agreement and the covenants and accords made hereunder shall be effective on the day of its execution by the Parties hereof.

4. The Parties hereto represent and warrant:

a) That they are corporations authorized to do business under the Laws of the Commonwealth of Puerto Rico and/or in their State of Incorporation, are in good standing in the Commonwealth of Puerto Rico and/or in their State of Incorporation and that they have requisite power and authority to own their properties and to carry on their business as now conducted and carried out.

b) That they have the capacity, power and authority to execute, deliver and carry out this Agreement, which capacity, power and authority does not require the consent of a third party to this Agreement, and that they have

the capacity and have been duly authorized by their governing body to so act and that this Agreement is enforceable in accordance with its terms.

5. This Agreement shall be construed and its terms and conditions enforceable within the jurisdiction and in accordance with the laws of the Commonwealth of Puerto Rico.

IN WITNESS WHEREOF, the Parties hereto have duly executed this Agreement this ___26th ___day of October, 1983.

M.D. CONSTRUCTION COMPANY, INC.

By: /s/ Morris Demel
Morris Demel-President

APRIL INDUSTRIES, INC.

By: /s/ Morris Demel
Morris Demel-President

USI PROPERTIES CORP.

By: /s/ Donald L. Alberty
Donald L. Alberty
Vice President-Operations

Affidavit No. -1997-

Subscribed before me by Morris Demel in his capacity as President of April Industries, Inc. and M.D. Construction Company, Inc. and by Donald L. Alberty in his capacity as Vice President-Operations of USI Properties Corp., both of the personal circumstances hereinbefore stated, to me personally known, in San Juan, Puerto Rico, this -26th- day of October, 1983.

/s/ ?????
Notary Public

APPENDIX IV

Complaint filed on October 27, 1983 by USI Properties Corp., as plaintiff against M.D. Construction Company, Inc. and Compañía de Desarrollo Cooperativo (C.D.C.)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Civil Number 83-2647 (RA)
(Plaintiff Demands Trial By Jury)

USI PROPERTIES CORP.

Plaintiff

Vs.

M.D. CONSTRUCTION COMPANY, INC. and COMPAÑIA DE DESARROLLO COOPERATIVO

Defendants

Filed Oct. 27, 1983

COMPLAINT

Comes Now plaintiff through the undersigned attorney and alleges and prays as follows:

I. *Jurisdiction of the Court:*

Jurisdiction of this court is vested by 28 USC Section 1332 inasmuch as there is diversity of citizenship and the controversy exceeds $10,000.00, exclusive of interests and cost since plaintiff, USI Properties Corp. is a Delaware Corporation with its principal office in the state of New York and defendants M.D. Construction Company, Inc. and Compañia de Desarrollo Cooperativo are corporations organized pursuant to the laws of the Commonwealth of Puerto Rico with principal offices in the City of San Juan, Puerto Rico.

II. *First Cause of Action:*

1. Pursuant to the provisions of Deed Number Six (6) executed on October 17, 1978 before Notary Public Federico Ramírez Ros, USI Properties

Corp. (USI) sold to M.D. Construction Company, Inc. (M.D.) a certain parcel of land which was specifically described therein, for the sum of $1,224,230.70. A copy of the aforestated document is attached hereto as Exhibit 1.

2. At the time of the aforestated closing USI received from M.D. payment of the sum of $5,000.00 to be applied towards the purchase price and also received a note in the face amount of $1,585,000.00 payable on or before October 16, 1983 which face amount includes the unpaid portion of the purchase price and interest from the date of issuance of the note until October 16, 1983 at the rate of six percent (6%) per annum. A copy of the aforestated document is attached hereto as Exhibit 2.

3. The aforestated note was secured by a mortgage on the parcel of land which was the object of the purchase-sale agreement. Said mortgage was constituted pursuant to the provisions of Deed Number Six (6) executed on October 17, 1978 before Notary Public Federico Ramírez Ros.

4. The aforestated mortgage was duly recorded in the Registry of Property of Puerto Rico.

5. Plaintiff is still the holder of note heretofore mentioned.

6. M.D. has defaulted in its obligations arising out of the aforestated note since it has not paid to the plaintiff the amount evidenced by said note. As of this date M.D. owes to the plaintiff the sum of $1,201,600.00 on account of the aforestated as principal and interest which monies are presently due and payable.

7. In addition of the aforestated, pursuant to the provisions of the above mentioned note, MD also

owes to the plaintiff the agreed upon sum of $60,080.00 as a liquidated amount to cover costs and expenses (including attorney fees) on account of plaintiff being forced to resort to the Courts for the collections of the monies due to it.

8. On various ocassions the plaintiff has requested from M.D. the payment of the outstanding balance of the note which is the subject matter of this action.

III. Second Cause of Action:

1. On October 17, 1978, USI, M.D. and Compañia de Desarrollo Cooperativo (CDC) among others, entered into an agreement whereby CDC agreed to buy 700 houses to be constructed on the parcel of land sold by USI to M.D., to provide construction, financing to M.D., to provide permanent financing for the ultimate purchasers of the houses, all of which would result in the repayment to the plaintiff of the monies due it, pursuant to the allegations contained in the first cause of action. A copy of the aforestated document is attached hereto as Exhibit 3.

2. In the aforestated agreement it was represented to the plaintiff by CDC that it would not default in and would not modify the obligations assumed by it to finance the development of the parcel heretofore referred to and the obligation to purchase from M.D. the seven hundred residential units to be built and the re-payment provisions to the plaintiff contained in the agreement dated October 17, 1978.

3. As a result of the aforestated representations, the plaintiff consented to the subordination of its $1,585,000.00 note and mortgage securing same to a note and mortgage securing same in the

amount of $5,000,000.00 issued by MD to Compañia de Desarrollo Cooperativo.

4. Compañia de Desarrollo Cooperativo defaulted in the performance of its obligations to finance the development of the parcel of land mentioned before and to purchase the residential units from M.D. and therefore prevented the repayment provisions of plaintiff's heretofore mentioned credit.

5. The breach by Compañia de Desarrollo Cooperativo of the obligations arising out of the agreement dated October 17, 1978 has caused plaintiff's security to be imperiled since on account of CDC's representations and assumed obligations, the mortgage securing plaintiff's $1,585,000.00 note was subordinated and it now has second rank in priority in the Registry of Property. In addition, CDC's default has caused the repayment provisions of the agreement to become inefective and thus has caused a large portion of plaintiff's credit to remain unpaid as of this date.

6. As a result of the aforestated, upon execution of the mortgage securing the note of which plaintiff is the holder, the owner of the property by public sale, will be obliged to pay the principal and interest due and payable pursuant to the $5,000,000.00 face amount note issued by MD to Compañia de Desarrollo Cooperativo.

7. CDC's breach of its obligations arising out of the October 17, 1978 agreement have caused the debt to plaintiff to remain unpaid, thereby damaging and imperilling plaintiff's standing as a creditor and therefore such breaches have caused CDC to become liable to the plaintiff for the full

amount of its credit as stated in the First Cause of Action.

IV. *Prayer for Relief:*

Wherefore it is respectfully requested from the Court that a judgment be entered as follows:

1. Against M.D. to pay to plaintiff the sum of $1,201,600.00 as principal and interest due as of this date as alleged herein in the First Cause of Action.

2. Against M.D. to pay to plaintiff all interests that may accrue hereafter until a full and complete payment of plaintiff's credit is made.

3. Against M.D. to pay to plaintiff the sum of $60,080.00 which is the agreed upon amount to be paid to plaintiff as liquidated damages to cover costs and expenses (including attorney fees) on account of plaintiff having to resort to judicial proceedings to collect the credit due to it.

4. Against Compañia de Desarrollo Cooperativo to pay to plaintiff the monies owed by M.D. to plaintiff.

5. Granting any other remedy to which plaintiff may be entitled.

Respectfully submitted in San Juan, Puerto Rico, this ___day of October, 1983.

LEDESMA, PALOU & MIRANDA
Banco de Ponce Bldg.
11th Floor-Suite 1103
Hato Rey, Puerto Rico 00918
Tel: 754-6300

By: /s/ Ruben T. Nigaglioni
Ruben T. Nigaglioni

APPENDIX V

Filed on October 31, 1983 by
Cross Claim filed on October 31, 1983
M.D. Construction Company, Inc. against
Compañía de Desarrollo Cooperativo
(C.D.C.)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

CIVIL NO. 83-2647 (RA)

USI PROPERTIES CORP.,

Plaintiff

vs.

M.D. CONSTRUCTION COMPANY, INC. and COMPAÑIA DE DESARROLLO COOPERATIVO,

Defendants

ACTION FOR:

COLLECTION OF MONIES; DAMAGES; CONSPIRACY, FRAUD, DECLARATORY JUDGMENT, LOSS OF REPUTATION, CREDIT, etc.

CROSS CLAIMANT DEMANDS TRIAL BY JURY

CROSS CLAIM OF CO-DEFENDANT M.D. CONSTRUCTION COMPANY, INC.

TO THE HONORABLE COURT:

Cross Claimant, M.D. Construction Company, Inc., through its undersigned attorneys, cross claiming against cross defendant Compañia De Desarrollo Cooperativo, respectfully alleges and prays as follows:

ALLEGATIONS COMMON TO ALL CROSS CLAIMS

1. The jurisdiction of this Court is invoked pursuant to the jurisdiction of the principal action herein, and the con-

troversy exceeds the sum of $10,000.00, exclusive of interests and costs.

2. October 17, 1978 Cross Claimant purchased from plaintiff a parcel of land, pursuant to Deed Number Six before Notary Federico Ramirez Ros, comprising approximately 235 cuerda located in Humacao, Puerto Rico (the "Property").

3. The said Property was purchased by Cross Claimant from plaintiff on October 17, 1978 subject to a purchase money mortgage in the amount of $1,585,000.00 ("P.M. Mortgage"), on which there is presently a balance outstanding of $1,201,600.00.

4. On October 17, 1978 Cross Claimant and Cross Defendant entered into a contract denominated "Purchase And Sale Agreement whereby Cross Defendant agreed to purchase from Cross Claimant 700 housing units and lots on which the housing units were to be constructed ("Units"), in a housing project to be developed and constructed by Cross Claimant on the Property, known as the "Ciudad Cristiana Project".

5. The minimum agreed purchase price per Unit, dependent upon the size of the lot was $27,800.00, with Cross-Defendant having agreed to take delivery of, and make payment for, the Units, when delivered by Cross-Claimant to Cross-Defendant.

6. Pursuant to a loan agreement between Cross Claimant and Cross Defendant dated October 17, 1978 ("Loan Agreement") Cross Defendant agreed to make progress payments to Cross Claimant during development and construction of the Ciudad Cristiana Project.

7. Cross Defendant, pursuant to the Purchase And Sale Agreement also agreed to provide the permanent financing to the ultimate purchasers of the Units.

8. Pursuant to an agreement dated October 17, 1978 among plaintiff, Cross Claimant, Cross Defendant, April

Industries, Inc. ("April") and Royal Bank of Canada ("Royal Bank") (hereinafter referred to as the "Multi-Party Agreement"), plaintiff subordinated its P.M. Mortgage to a $5,000.000.00 mortgage on the Property to secure a demand note issued by Cross Claimant and delivered to Cross Defendant, which Cross Defendant pledged to Royal Bank to secure the repayment by Cross Defendant of the monies Cross Defendant borrowed from Royal Bank to finance the development and construction of the Ciudad Cristiana Project.

9. It was also further agreed in the Multi-Party Agreement that USI would be paid its P.M. Mortgage from the proceeds of the sale of each of the Units to Cross Defendant.

AS AND FOR A FIRST CROSS CLAIM

10. Cross Claimant repeats, reiterates and realleges all the allegations contained in paragraphs numbered "1" through "9", inclusive hereof, with the same force and effect as though more fully set forth herein at length.

11. On or about the 7th day of July 1982 Cross Claimant delivered 53 Units to Cross Defendant on which Units Cross Defendant refused to close title, and refused to make payment therefor to Cross Claimant, totalling a purchase price of $1,868,674.00.

12. That as at the aforestated date of July 7, 1982, and up to the present time Cross Claimant delivered to Cross Defendant a total of 480 Units, leaving a balance of 220 Units to be constructed and delivered by Cross Claimant to Cross Defendant.

13. Cross Defendant refused to permit Cross Claimant to continue with the development and construction of the Ciudad Cristiana Project, and informed Cross Claimant that it would not accept the delivery from, or make payment of the purchase price to Cross Claimant of any further Units.

14. As a result of the breach by Cross Defendant of the aforementioned Agreements, Cross Claimant has suffered damages in an amount in excess of $7,000,000.00; including, without limitation thereof, the sum of $217,194.00 which Cross Defendant refused to pay to Cross Claimant upon delivery to Cross Defendant of the 53 Units aforementioned in paragraph 11 hereof, Cross Claimant's loss of profits on the balance of the 220 Units which Cross Defendant refused to permit Cross Claimant to develop, construct and deliver to Cross Defendant, interest continued to be charged by Cross Defendant to Cross Claimant, various interest losses of Cross Claimant on the Ciudad Cristiana Project, and interest accruing on the indebtedness of Cross Claimant to USI.

AS AND FOR A SECOND CROSS CLAIM

15. Cross Claimant repeats, reiterates and realleges all the allegations contained in paragraphs numbered "1" through "14", inclusive hereof, with the same force and effect as though more fully set forth herein at length.

16. Upon information and belief, pursuant to, and in furtherance of, a recent fraudulent plan, scheme and conspiracy of Cross Defendant and the Government Development Bank For Puerto Rico, and certain of their officials and/or agents, acting on their behalf, effectuated the said fraudulent plan, scheme and conspiracy as hereinafter described.

17. Upon information and belief during the time of the acts complained of herein, the Cross Defendant, without the knowledge of Cross Claimant, wrongfully and secretely joined and fraudulently confederated, connived and conspired together in formulating the deliberate design, intent and purpose to defraud Cross Claimant of the monies due Cross Claimant from Cross Defendant, by fabricating various claims by Cross Defendant against Cross Claimant;

which fabricated claims of Cross Defendant are entirely without merit.

18. Upon information and belief, pursuant to the said conspiracy, which still exists, and as part thereof, and intending to take advantage of Cross Claimant by the said acts of conspiracy, fraud, deceit and duplicity, Cross Defendant did, with intent and malice aforethought effectively deceive, mislead and defraud Cross Claimant as aforestated and by the conspirators causing the $5,000,000.00 Mortgage Note held by Royal Bank in pledge, as aforementioned to be assigned to the Government Development Bank, through subterfuge, ostensibly * * * the Government Development Bank as a holder in due course when in reality the title of holder in due course by the Government Development Bank is spurious and fictitious; the conspirators intending by said acts to attempt to defeat the claims of Cross Claimant against Cross Defendant.

19. As a result thereof, Cross Claimant has sustained great losses and damages which have been inflicted upon it by virtue of the said conspiracy and fraudulent acts done in pursuance thereof; that upon information and belief, the said conspirators intended that Cross Claimant should sustain great losses and damages as a result of their conspiracy and the fraud practiced upon Cross Claimant, and that the monies which Cross Claimant lost by reason thereof, the Cross Defendant intended to gain and did gain for itself and become unjustly enriched.

20. By reason of the foregoing, plaintiff has been damaged in a sum in excess of $7,000.000.00.

AS AND FOR A THIRD CROSS CLAIM

21. Cross Claimant repeats, reiterates and reallages all the allegations contained in paragraphs numbered "1" through "20", inclusive hereof, with the same force and effect as though more fully set forth herein at length.

22. Cross Claimant will be without any remedy in the premises unless this Court declares and adjudicates that the $5,000,000.00 Mortgage Note aforementioned is null and void so that the conspirators be not unjustly enriched by their acts as aforestated, and that the said Mortgage Note be cancelled as of record.

AS AND FOR A FOURTH CROSS CLAIM

23. Cross Claimant repeats, reiterates and realleges all the allegations contained in paragraphs numbered "1" through "22", inclusive hereof, with the same force and effect as though more fully set forth herein at length.

24. Cross Claimant has been actively engaged and has devoted years and much industry, time, effort and money in the development and construction business; and has achieved a marked degree of success in its business; and has enjoyed the esteem and respect of persons engaged in the same business and in other businesses; and Cross Claimant's reputation of honesty and integrity is excellent beyond question.

25. Upon information and belief, the acts of the conspirators aforementioned and the commencement of a legal action by Cross Defendant against Cross Claimant in the Superior Court Puerto Rico, San Juan Section, under Civil No. 83-5384 (805) the publication and circulation of which among various persons * * * the public, have defamed and decimated the reputation and credit * * * Cross Claimant.

26. The published and circulated statements by Cross Defendant concerning Cross Claimant as aforementioned are false, defamatory, untrue and fabricated.

27. As a direct and proximate result of the publication and circulation of the false, scurrilous, irresponsible and defamatory matter by the aforementioned conspirators and specifically the aforementioned litigation by Cross Defendant against Cross Claimant, as aforementioned, the

name of Cross Claimant has been brought into disrepute and its reputation and honesty and integrity in its business dealings and its financial credit have been irreparably damaged and besmirched, and Cross Claimant has suffered damages in the sum of $2,000,000.00.

CROSS CLAIMANT DEMANDS TRIAL BY JURY.

WHEREFORE, Cross Claimant demands judgment against Cross Defendant as follows:

1. In the sum in excess of $7,000,000.00 in the First and Second Cross Claims.

2. Declaring and adjudicating that the $5,000,000.00 Mortgage Note assigned and transfered to the Government Development Bank is null and void and that the same be cancelled as of record in the pertinent Registry of Property.

3. In the sum of $2,000,000.00 in the Fourth Cross Claim.

4. In the sum of $350,000.00 for costs and attorney fees; plus interest a the maximum legal rate on all amounts recovered from due dates thereof.

5. For such other and further relief as this Court may deem just and proper in the premises.

DATED: San Juan, Puerto Rico, this 31 day of October 1983.

WOODS WOODS & MAYO

BY: /s/ Harry E. Woods
HARRY E. WOODS
Attorneys for Cross Claimant
P.O. Box 13802
Santurce, Puerto Rico 00908
Tel. (809) 754-7700

I CERTIFY that on this same date I forwarded to Ruben T. Nigaglioni, Esq. of Ledesma, Palou & Miranda, Esqs.,

via U.S. Mail, Postage Prepaid, to Banco de Ponce Building, 11th Floor, Suite 1103, Hato Rey, Puerto Rico 00918, copy of the within Cross Claim of Co-Defendant M.D. Construction Company, Inc.

/s/ Harry E. Woods
HARRY E. WOODS

APPENDIX VI

Jury Verdict of June 19, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Civil No. 83-2647 (JAF)

U.S.I. PROPERTIES CORP.,

Plaintiff

v.

M.D. CONSTRUCTION, INC. and CORPORACION DE DESARROLLO COOPERATIVO,

Defendants

VERDICT

We, the Jury, find as follows:

1. Did CDC violate the terms and conditions of the contracts of October, 1978, as it pertains to USI's subordinated mortgage over the property where Ciudad Cristiana was built? Answer YES or NO.

YES

2. Is USI entitled to recover the value of its mortgage from CDC? Answer YES or NO.

YES

3. If the answer to question No. 2 is in the affirmative, please state what amount, if any, regarding said mortgage, USI is entitled to recover.

$1,405,792

4. Did CDC violate the terms and conditions of the contracts of October, 1978 as it pertains to MD? Answer YES or NO.

YES

5. Did CDC incur in negligence regarding its contractual and business relations with MD? Answer YES or NO.

YES

6. Did MD suffer any damages as a result of CDC's conduct as found by you? Answer YES or NO.

YES

7. If the answer to question No. 6 is in the affirmative, what damages, if any, do you find MD suffered?

	ITEM OF DAMAGE	AMOUNT
a-	IMPROVEMENT TO SITE	769,864
b-	AMOUNT ALLEGEDLY OWED	257,124
c-	NET PROCEEDS TO BE OBTAINED FROM 53 UNITS	217,194
d-	LOSS PROFITS ON 220 UNITS NOT CONSTRUCTED	434,000
e-	INCREASED ADMINISTRATIVE COSTS	218,000
f-	INTEREST ON ALL CLAIMS ABOVE 1982 TO 1987 AT 12%	227,542
g-	LOSS OF BUSINESS OPPORTUNITY	1,750,000
h-	LOSS OF REPUTATION	7,000,000
i-	ADDITIONAL ADMINISTRATIVE COSTS	482,500

8. Did USI, alone or along with others, fraudulently represent to CDC that the land on which the Ciudad Cristiana project was to be constructed was free from pollution of dangerous toxic materials? Answer YES or NO.

NO

9. Did USI, alone or along with others, fraudulently sell land which, after building Ciudad Cristiana, would still remain subject to danger of severe flooding? Answer YES or NO.

NO

10. Did MD, alone or along with others, fraudulently represent to CDC that the land on which the Ciudad Cris-

tiana project was to be constructed was free from pollution of dangerous toxic materials? Answer YES or NO.

NO

11. Did MD, along or along with others, fraudulently sell land which, after building Ciudad Cristiana, would still remain subject to danger of severe flooding? Answer YES or NO.

NO

12. As a result of the evidence received, do you find that in the first months of 1985 Ciudad Cristiana was polluted with Mercury so as to create a health hazard to humans necessitating the permanent relocation of the community? Answer YES or NO.

NO

13. In the event that your answer to question No. 12 is in the affirmative, is CDC entitled to set aside and rescind or annul the contracts entered into in October, 1978 based on said situation? Answer YES or NO.

NO

DATED: JUNE 19, 1987 (SIGNED) AIXA RODRIGUEZ
FOREPERSON

Supreme Court, U.S.
FILED
MAY 8 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1428

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

COMPANIA DE DESARROLLO COOPERATIVO,
Petitioner,

v.

USI PROPERTIES, CORP.
MD CONSTRUCTION, INC.,
Respondents

PETITIONERS REPLY BRIEF

HECTOR RIVERA CRUZ
Secretary of Justice
Commonwealth of Puerto Rico

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May 8, 1989

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1428

COMPAÑIA DE DESARROLLO COOPERATIVO,
Petitioner,

v.

USI PROPERTIES, CORP.
MD CONSTRUCTION, INC.,
Respondents.

PETITIONERS REPLY BRIEF

TO THE HONORABLE COURT:

NOW COMES PETITIONER, COMPAÑIA DE DESARROLLO COOPERATIVO, and respectfully submits its Reply Brief to Respondent's Opposition to the Petition for a Writ of Certiorari:

I. ARGUMENT

On April 24, 1989 respondent, MD Construction, Inc. filed a Brief in Opposition to the Petition for a Writ of Certiorari. The following arguments merit discussion in a Reply Brief:

1. At pages twelve (12) and thirteen (13) of the Opposition Respondent argues that USI did not need

to "conspire with MD in order to have access to the Federal Court", because "diversity of citizenship exists without the October 26th agreement". This is a fallacious argument for various reasons. First, MD and CDC have the same citizenship so MD could not have filed a case against CDC in Federal Court. Second, USI could certainly file a case against MD in Federal Court because USI is a New York corporation and MD is a Puertorican corporation. But after the October 1983 agreement USI had no need to file such a case. Third, the real question is whether USI could have filed a case based on diversity jurisdiction *against CDC alone*. In this regard it is important to remember that the First Circuit acknowledged that in a case commenced by USI "as plaintiff and CDC as the sole defendant, MD would undisputably have been found to be an indispensable party under both R.19 A(1) and A(2)". 860 F 2d 1, 5 N. 1 (1st Cir. 1988). Since MD would necessarily have been joined as a party in such a suit the problem is whether it would have been aligned as a plaintiff or as a defendant. Petitioner submits that the agreement of October 26, 1983 requires that in such an eventuality MD be aligned as a plaintiff. This is so because USI and MD's interests coincide completely, particularly with regard to the *only controversy* to be litigated in Federal Court, that is: Who was liable for breach of contract in the Ciudad Cristiana Agreements.[1]

Finally, the point is not whether diversity of jurisdiction existed *without* the October 26, 1983 agree-

[1] MD's debt to USI would not even be involved in a case by USI against CDC alone because USI would not have filed a Complaint against MD. So, if MD agrees with USI about CDC's liability pursuant to the 1983 agreement it would have to be aligned as a plaintiff together with USI and against CDC.

ment, but whether diversity jurisdiction existed *after* the October 1983 Agreement and prior to the filing of the complaint. Whatever genuine controversy existed between USI and MD before October 26, 1983 was eliminated by the agreement. After that date and before the filing of the complaint by USI no complete diversity jurisdiction existed in this case.

2. At pages sixteen (16) and seventeen (17) MD argues that USI needed a judgment against MD so that "it could if necessary, collect on such judgment" against MD. This is also a fallacious argument. This Court in *City of Indianapolis v. Chase National Bank*, 314 U.S. 63, 73 n. 3 (1941) rejected a similar argument by noting that Chase did not bring the suit in order to obtain a judgment against the gas company, because that was not really "in issue". In this case, it is ludicrous to suggest that after the agreement of October 26, 1983 USI brought this suit in Federal Court to obtain a judicial finding of MD's liability. The "issue" of MD's liability was eliminated by the agreement between USI and MD. Whatever "need for a judgment" USI may have had it was certainly not a "controversy" that justified aligning USI and MD on opposite sides.

MD's reliance on the case of *Fidelity & Deposit v. Sheboygan Falls*, 713 F. 2d 1261 (7th Cir. 1983) is completely misplaced.. MD argues that in *Fidelity* the Court noted that the plaintiff "really did want a judgment" against codefendant Scotty, so that realignment of Scotty was not proper. 713 F. 2d to at 1267. But that point was made by the Seventh Circuit because there was nothing to suggest that at the time of the filing of the complaint Fidelity, the plaintiff, and Scotty the defendant had reached an agreement

resolving all their differences. Indeed, the Court stated that if Fidelity knew "when it filed its complaint that Scotty [the codefendant] would in effect confess liability under the indemnity agreement", then there would be no actual substantial controversy between them "that would justify placing them on opposite sides of the lawsuit". 713 F. 2d 1266 - 1267. Of course, the Seventh Circuit was speculating on the real situation of the parties prior to the filing of the Complaint. In that case there was no written agreement between the parties. In this case, the October 26, 1983 agreement clearly demonstrates that USI *knew* that MD's answer to the complaint would admit liability to USI. So it is clear that under the principles expounded by the Seventh Circuit in *Fidelity*, MD would have been realigned as a plaintiff in this case.

In short, all the Circuit Courts that have considered the issue of realignment, in the cases cited in the Petition for a Writ of Certiorari, pages 12 - 13, would have clearly realigned MD as a plaintiff in this case. Nobody, neither the Courts involved nor Respondent, have been able to say or describe what was the *controversy* between USI and MD at the time of the filing of the complaint. The reality is that there was no controversy whatsoever.

This Court has made no pronouncements on realignment doctrine since the case of *City of Indianapolis* in 1941. In the 1980's decade the realignment doctrine has produced several important Circuit Court decisions. A conflict has now developed between the Circuits. It is time for this Court to reaffirm the viability of realignment doctrine and to clarify the content and scope of the doctrine.

II. CONCLUSION

For the foregoing reasons, it is respectfully requested from this Honorable Court that it grant this Petition for Writ of Certiorari to the Court of Appeals for the First Circuit.

In San Juan, Puerto Rico, this May 5, 1989.

RESPECTFULLY SUBMITTED.

HECTOR RIVERA CRUZ
Secretary of Justice
Commonwealth of Puerto Rico

RAFAEL ORTIZ CARRION
Solicitor General
Commonwealth of Puerto Rico

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